NATIONAL NATIVE TITLE TRIBUNAL

Western Desert Lands Aboriginal Corporation (Jamukurnu Yapalinkunu) RNTBC v MDR (Thomsons) Pty Ltd **[2014] NNTTA 91 (8 September 2014)**

Application No: WO2012/0799

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

- and -

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

Western Desert Lands Aboriginal Corporation (Jamukurnu Yapalinkunu) RNTBC (native title party)

- and -

The State of Western Australia (Government party)

- and -

MDR (Thomsons) Pty Ltd (grantee party)

DETERMINATION THAT ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: James McNamara, Member
Place: Brisbane
Date: 8 September 2014

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

Legislation: *Native Title Act 1993* (Cth), ss 29, 30(1), 31, 32(3), 150, 151(2), 155, 162(2), 237

Mining Act 1978 (WA)

Aboriginal Heritage Act 1972 (WA)

Cases:

Billy Coolibah and Others on behalf of the Gurdanji and Garawa Peoples/Ashton Mining Ltd/Northern Territory [2002] NNTTA 137 (‘*Coolibah v Ashton Mining*’)

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*’)

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

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

Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/State of Queensland [2012] NNTTA 31 (‘*Drake Coal v Smallwood*’)

James v Western Australia [2002] FCA 1208 (‘*James v Western Australia*’)

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

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

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

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

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

Rosas v Northern Territory (2002) 169 FLR 330; [2002] NNTTA 113 (‘*Rosas v Northern Territory*’)

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

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

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

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

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

Western Australia/Winnie McHenry on behalf of the Noongar People [1999] NNTTA 210 ('*Western Australia v McHenry*')

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

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

WF (deceased) & Ors on behalf of the Wiluna Native Title Claimants/Western Australia/Emergent Resources Ltd [2012] NNTTA 17 ('*WF v Emergent Resources*')

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

Representative of the native title party:	Mr Matthew Kinder, Western Desert Lands Aboriginal Corporation
Representatives of the Government party:	Mr Luke Villiers, State Solicitor's Office Mr Matthew Smith, Department of Mines and Petroleum
Representative of the grantee party:	Mr Kevin Connell, Austwide Mining Title Management Pty Ltd

REASONS FOR DETERMINATION

[1] On 26 March 2012, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E45/3637 ('the proposed licence') to MDR (Thomsons) Pty Ltd ('the grantee party'). The notice included a statement that the Government party considers that the grant attracts the expedited procedure (that is, that the proposed licence is an act that can be done without the normal negotiations required by s 31 of the Act) and, in accordance with s 29(4)(a) of the Act, specified the 'notification day' as 29 March 2012. The proposed licence comprises an area of 68 graticular blocks (approximately 214 square kilometres) located 204 km south-east of Telfer in the Shire of East Pilbara.

[2] 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.

[3] On 27 July 2012, the Western Desert Lands Aboriginal Corporation (Jamukurnu Yapalinkunu) RNTBC ('the native title party'), on behalf of its members, lodged an objection to the inclusion of the expedited procedure statement in respect of the proposed licence. The native title party was registered following the determination of the Federal Court in *James v Western Australia*, and holds the native title rights and interests on trust for the common law holders identified in the determination. The proposed licence is situated entirely within the external boundaries of the determination area.

[4] In accordance with what was then standard practice in relation to expedited procedure objection applications, the Tribunal issued directions requiring parties to provide contentions and supporting documents for an inquiry to determine whether the expedited procedure is attracted. These directions allowed a four month period after the closing date for the lodgement of objections for parties to discuss the possibility of reaching an agreement which could lead to the disposal of the objection by consent, although these directions were vacated on 30 January 2013 to enable parties to continue negotiations around a proposed heritage agreement.

[5] At a status conference convened on 12 June 2013, the Tribunal determined that directions for the inquiry should be reinstated and the matter should proceed to determination, though these dates were subsequently revised at a directions hearing on 18 June 2013. On 20 June 2013, President Raelene Webb QC directed parties to attend a conference pursuant to s 150 of the Act for the purpose of assisting them to resolve any matter relevant to the inquiry. The s 150 conference was convened on 2 July 2013, but did not result in the resolution of the matter.

[6] In compliance with the directions, the Government party provided supporting documentary evidence on 19 August 2013. On 20 August 2013, the native title party informed the Tribunal that a senior Martu woman and key witness in this matter had died, and requested an extension to the directions on the basis that sorry business would have a significant and immediate impact on its ability to gather evidence for the inquiry. This extension was granted, and the native title party provided supporting documentary evidence on 4 September 2013 and a statement of contentions on 6 September 2013 ('NTP Contentions').

[7] The native title party's documentary evidence was provided to the Tribunal on the basis that the contents of the documents were either culturally sensitive or restricted to men according to traditional law and custom and should be subject to non-disclosure directions under s 155 of the Act. Following the unexpected passing of Member Daniel O'Dea, who had been appointed to the matter, and in the absence of another male Tribunal member, President Webb appointed herself to the matter for the purpose of determining how the inquiry should proceed.

[8] Following consultation with the parties, President Webb issued directions on 8 January 2014 requiring the native title party to provide a statement outlining its concerns and issues

without disclosing information that may not be viewed by a female person. Before the statement was provided, I was appointed as a Member of the Tribunal on 31 March 2014 and to these matters on 2 April 2014. On the basis of my appointment, the native title party informed the Tribunal by email on 3 April 2014 that it intended to rely on the materials previously filed and would not be making any further submissions. As this material had yet to be provided to the other parties, I issued interim non-disclosure directions in relation to the documents and directed parties to attend a directions hearing on 30 April 2014 to determine whether any further directions should be made.

[9] At the directions hearing, the representatives of the grantee party and the Government party indicated they would not oppose the Tribunal making final non-disclosure directions in the terms proposed. Directions were also made for the grantee party and the Government party to file submissions in relation to the objection, and for the native title party to provide a statement of contentions in reply. Statements of contentions were provided by the grantee party and the Government party on 14 May 2014 and 27 May 2014 respectively. No further submissions were received from the native title party.

[10] In lieu of a listing hearing, the Tribunal wrote to parties by email on 19 June 2014 requesting indication of whether they intended to file any further submissions and whether they wished to proceed to a hearing or have the matter determined on the papers (that is, without a hearing) in accordance with s 151(2) of the Act. The grantee party and the Government party confirmed they had no further submissions and were content for the determination to proceed on the papers. No response was received from the native title party. Having considered the materials provided to the Tribunal, I am satisfied it is appropriate to proceed without a formal hearing.

Legal principles

[11] Section 237 of the Act provides:

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

(c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

[12] In determining whether a proposed future act attracts the expedited procedure, the Tribunal is required to make a predictive assessment of the effect the proposed future act is likely to have on the matters identified in s 237. Specifically, the Tribunal must assess the likelihood of the proposed future act giving rise to interference or disturbance of the kind referred to in that section. That assessment is not made on the balance of probabilities, but requires the Tribunal to consider whether there is a real risk or chance of interference or major disturbance arising from the future act (see *Smith v Western Australia* at [23]; *Walley v Western Australia* at [8]; *Little v Western Australia* at [68]-[72]). Though the Act does not impose an onus of proof on any party, the Tribunal is required to adopt a commonsense approach to the evidence (see *Ward v Western Australia* at 215-218).

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

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

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

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

(c) The term 'community activities' is not necessarily limited to the activities of a particular localised community. However, if evidence is not derived from the collective experiences of a localised group of persons, then specific evidence must

be provided to identify the individuals as a community (see *Silver v Northern Territory* at [59]).

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

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

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

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

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

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

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

[84]-[87] and [91]. I also adopt the findings of Member O'Dea in *Cherel v Faustus Nominees* at [81]-[91].

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

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

(b) The assessment of whether the future act is likely to involve, or create rights whose exercise are likely to involve, major disturbance to the land and waters must be evaluated by reference to what is likely to be done, rather than what could be done (see *Little v Oriole Resources* at [51]).

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

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

Government party Contentions and Evidence

[18] The Government party provided the following documents in relation to the proposed licence:

(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.

[19] The Tengraph quick appraisal establishes that the underlying tenure is unallocated Crown land. The quick appraisal also indicates that the area has previously been subject to nine exploration licences granted between 1992 and 2005, overlapping at between 9.5 per cent and 69 per cent. Each of these licences had been surrendered by 2009. The document also establishes that the area was subject to temporary reserves between 1959 and 1964 and from June to December 1965.

[20] The report from the DAA Database establishes that no sites registered under the AHA or 'other heritage places' are located within the proposed licence.

[21] The Draft Tenement Endorsement and Conditions Extract indicate that the proposed licence 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]). 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 grant:

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.

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

> In respect of the area covered by the licence the Licensee, if so requested in writing by the Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu), the determined native title holders for the Martu People (Area A), Federal Court determination no. WAD 6110 of 1998 (WC 96/78), such request being sent by pre-paid post to reach the Licensee's address, c/- Austwide Mining Title Management Pty Ltd, PO Box 1434, Wangara WA 6947, not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of the Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu), the Regional Standard Heritage Agreement endorsed by peak industry groups and the Pilbara Native Title Service.

Native Title Party Contentions and Evidence

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

(a) The affidavit of Neil Pitu, Mitchell Biljaba, Teddy Biljabu, Norman Sammy, Colin Peterson and Brian Samson sworn on 29 August 2013 ('Martu Men Affidavit').

(b) The affidavit of Norman Sammy sworn on 29 August 2013 ('Sammy Affidavit').

(c) The affidavit of Margaret Samson sworn on 29 August 2013 ('M Samson Affidavit').

(d) The affidavit of Brian Samson sworn on 29 August 2013 ('B Samson Affidavit').

(e) The affidavit of Professor Robert Tonkinson sworn on 1 September 2013 ('Tonkinson Affidavit').

[24] The native title party also relies on a Community Layout Plan report for the Parnngurr (Cotton Creek) Community published by the Department of Planning in February 2007 ('Parnngurr Report').

[25] As noted above at [7], the affidavit material (apart from the B Samson Affidavit) was provided on the basis that it would be subject to non-disclosure directions. Mr Samson's affidavit was provided in support of the proposed directions, but is also relied on in support of the native title party's substantive submissions. Although the directions are aimed at limiting the disclosure of the affidavit material, s 162(2) of the Act requires (and the directions expressly permit) the Tribunal to state any findings of fact on which this determination is based. Hence, though I am cognisant of the Martu people's concerns about the dissemination of secret and sacred information, I refer to the contents of the affidavits to the extent necessary to explain the factual basis of my decision.

[26] In relation to the Martu Men Affidavit, the deponents describe themselves as Martu elders and members of the native title party and say that, as elders, they have authority to speak for Martu country including the proposed licence area. Mr Sammy also describes himself as a Martu elder and member of the native title party, and notes that the area in which the proposed licence is located is his mother's country. Mr Sammy states that, while preparing his affidavit, he was accompanied from time to time by other senior Martu men, including Mr Pitu.

[27] Ms Samson describes herself as a Martu woman and a director and member of the native title party. Ms Samson states that she is also a Ngayunangalku woman, and has responsibility for the area extending from Jigalong along the Savory Creek out to Lake Disappointment. Ms Samson states that she is also connected to the McKay Range and has responsibility for maintaining a songline that passes through the range and heads eastwards past Parnngurr. Ms Samson indicates that, in preparing her affidavit, she has spoken to other Martu people who are connected to the proposed licence area, including Paddy Colley, whom she describes as 'one of the most senior people who speak for the tenement area' (M Samson Affidavit, paragraph 7).

[28] Mr Samson states that he is a senior initiated Martu man and director of the native title party (B Samson Affidavit, paragraphs 1, 9). Mr Samson states that his affidavit 'reflects my knowledge and authority to speak for the Ngayunangalku area of Martu country, and also my discussions with other Martu Elders who have authority to speak for the remaining areas of Martu country, including the area in and around the tenement' (B Samson Affidavit, paragraph 9). I take this to mean that the proposed licence is not in the Ngayunangalku area and Mr Samson does not have authority to speak for the area. However, as Mr Samson's affidavit deals with general features of Martu culture rather than matters that are specific to the proposed licence area, I am satisfied that it is appropriate to rely on the affidavit.

[29] I accept that the deponents of these affidavits have the appropriate authority to speak on behalf of the native title party in relation to the proposed licence area.

[30] The Government party contends that, while some assistance can be drawn from the Tonkinson Affidavit, it cannot be relied upon to supply information which does not appear in the primary evidence of the native title party, which should be relied upon to the exclusion of Professor Tonkinson's evidence with respect to the conduct of social or community activities and the presence of sites of particular significance (GVP Contentions, paragraph 29). I recently dealt with this contention in *Western Desert Lands v Teck Australia*, where Professor Tonkinson gave similar evidence. I adopt the findings outlined at [49]-[50] of that decision and have given weight to the Tonkinson Affidavit where appropriate.

Grantee Party Contentions and Evidence

[31] The grantee party's statement of contentions outlines the nature of its proposal, attempts to negotiate a heritage protection agreement with the native title party, the history of exploration in the area, and its attitude towards heritage issues.

[32] The grantee party states that the proposed licence area is considered to be geologically prospective for diamonds (GP Contentions, paragraph 2). The grantee party indicates that the area was previously subject to exploration licences E45/2541 and E45/2388, held by Caldera Resources Pty Ltd ('Caldera'). I note that E45/2541 covered 42 per cent of the proposed licence area, while E45/2388 covered 52.9 per cent (as the tenements were held concurrently, it can be presumed they did not overlap). According to the grantee party,

Caldera identified several potential targets through airborne magnetic surveys and ground reconnaissance sampling, which led to several drilling programs and a limited two-trench program in 2006. The grantee party says these works were 'cleared' by Martu representatives, who attended two of the drilling programs (GP Contentions, paragraphs 13-14).

[33] The grantee party states that it plans to target exploration on a dyke-like feature which provided the best drilling results for Caldera. This would involve another trenching program using earth-moving equipment to 'excavate 5 x 50m trenches across the dyke feature' at 300 to 400 metres apart and extract up to two tonnes of material for processing (as only two dimensions are provided, I presume they refer to the depth and length of the trench, as the width would presumably be determined by the size of the shovel). The equipment for this work would be transported to the site by low loader and then walked to work sites. The grantee party states that access to the drill and trenching sites would be by existing tracks or an alternative route acceptable to the Martu people (GP Contentions, paragraph 15).

[34] Following the completion of the initial work program, the grantee party states that it will continue to explore other parts of the area, including by way of airborne magnetic surveys, mapping and ground reconnaissance sampling to determine other drill sites. The grantee party states that this work will not involve the grading of any new tracks, and Martu people would be provided details of all planned exploration programs prior to their commencement (GP Contentions, paragraph 18).

[35] The grantee party states that it 'has over a long period of time tried to negotiate an agreement for the grant of the [proposed licence] and to facilitate cultural protection and the preservation of heritage sites with the legal representative of the Martu people' (GP Contentions, paragraph 7). The grantee party refers to the s 150 conference convened by the Tribunal, and notes that its representatives met with the native title party's representative on a number of occasions subsequent to the conference but could not reach agreement. The grantee party says it views the agreement proposed by the native title party's representative as being too onerous, describing the proposed costs as excessive and discriminatory towards small exploration companies. Nevertheless, the grantee party states that it will continue to consult with the native title party 'with a view to negotiating a

heritage protection agreement on terms that are fair and reasonable to all parties' (GP Contentions, paragraph 8).

[36] The grantee party states that it understands the land is culturally important to the Martu people and may contain sites that are not recorded on the DAA Database, and it will consult with Martu people prior to commencing exploration to ensure that disturbance to the land is kept to a minimum and does not impact on significant sites or local communities (GP Contentions, paragraphs 5, 11). The grantee party undertakes to keep the Martu people informed of its planned operations and provide written notice if it intends to enter the area for the purpose of non-ground disturbing activities (GP Contentions, paragraph 12). Furthermore, the grantee party also undertakes to negotiate a heritage protection agreement prior to commencing any ground disturbing activities on the proposed licence (GP Contentions, paragraph 10). The grantee party also refers (at GP Contentions, paragraph 9) to putting measures in place to ensure its activities do not involve any interference or disturbance of the kind contemplated by s 237, though it does not specify what those measures will involve.

[37] The grantee party states that all topsoil will be removed ahead of exploration activities and separately stockpiled for replacement after backfilling or completion of operations. Trenches will be mapped by a geologist and then backfilled and the ground rehabilitated to the satisfaction of the statutory authorities and the Martu people (GP Contentions, paragraph 15). The grantee party notes that native vegetation is limited to sparse Spinifex grass and work sites will be selected in areas of minimal vegetation where no native fauna is present (GP Contentions, paragraph 17). At the completion of each exploration program, all materials including sample bags and equipment will be removed from the area and the Martu people informed (GP Contentions, paragraph 20). The grantee party states that it has a sound environmental record and has never been prosecuted for any breach of legislation (GP Contentions, paragraph 24).

Materials produced by the Tribunal

[38] On 2 July 2014, the Tribunal circulated to parties a map of the proposed licence produced by the Tribunal's Geospatial Services unit ('Tribunal Map'), noting its intention to rely on the map in its deliberations and seeking comment from parties. The Government party replied that it did not object to, or wish to comment on, the use of the Tribunal Map, and no

response was received the grantee party or the native title party. Consequently, I propose to refer to the Tribunal Map alongside the maps included in the Government party's documents and those annexed to the affidavits of Ms Samson, Mr Sammy, Professor Tonkinson and the Martu Men.

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

Contentions and evidence in relation to s 237(a)

[39] The native title party contends that the proposed licence area is the subject of current community and social activities by members of the native title party, encompassing their religious and cultural activities and activity associated with their law and custom, including the regulation of those laws and customs. These activities are said to include camping, hunting and gathering bush tucker, conducting traditional burning, ceremony, births and burials, and conducting traditional meetings. In addition to the matters disclosed in the affidavit material, the native title party relies on its registered native title rights and interests, the relative size of the proposed licence, and the proximity of the area to the Parnngurr community to support its contention that its members actively occupy the proposed licence area in the exercise of their exclusive native title rights and interests and as members of the relevant community (NTP Contentions, paragraph 4.5).

[40] Insofar that the native title party relies on the existence of its registered native title rights and interests, I have only taken them into account to the extent that the community and social activities of which there is evidence are a manifestation of those rights and interests (see *Western Australia v Thomas* at 166-167; *Re Koara People* at 81-82; *Drake Coal v Smallwood* at [77]).

[41] The proposed licence is situated approximately 80 kilometres south-east of the Parnngurr community, which Ms Samson describes as 'one of our main communities on Martu country' (M Samson, paragraph 27). The Parnngurr Report notes that an ATSIC Environmental Needs Survey conducted in 2004 recorded the community's population as 104 people; however, the report observes that the population of the community tends to fluctuate and can increase to between 300 and 500 people during law time (Parnngurr Report, paragraph 6.2). Mr Sammy states that it takes between two to three hours and a day to reach the proposed licence by car from Parnngurr (Sammy Affidavit, paragraph 20).

[42] Ms Samson states that the proposed licence area is considered a big living area, and is connected to other living areas to the east such as Timpurr Lake and others to the north around Well 23 (Kalypa), Well 24 (Katarru) and Well 25 (Wantili). According to Ms Samson, all these areas are rich in bush tucker, claypans and soaks (M Samson Affidavit, paragraphs 20-22). Mr Sammy also states that the area of country around and including the proposed licence 'has always been a camping and living area for Martu People.' This area is described as extending from Wells 23 and 24, which are said to be particularly good areas, through the proposed licence and south-east to the Timpurr and Warnturr lakes (Sammy Affidavit, paragraph 6). Ms Samson states that the proposed licence area is rich in bush tucker and refers to gathering seeds for damper, *minyara* (bush onion) and *wamala* (bush tomato). Ms Samson also notes that important medicines are obtained in and around the claypans and soaks (M Samson Affidavit, paragraphs 28-29). Reference is also made in Ms Samson's affidavit to a site in the Cronin Hills in the centre of the proposed licence, which is an area to which Martu people of a particular status travel (M Samson Affidavit, paragraph 9).

[43] Ms Samson states that Martu people 'continue to look after these areas, the soaks and claypans, the bush tucker, and the sacred places' (M Samson Affidavit, paragraph 24). Ms Samson states that, between December and March, Martu women bring young women on country 'to teach them about bush tucker and how to keep the country strong' (M Samson Affidavit, paragraph 25). During other times of the year, Martu women work as rangers, either with Martu men or in separate women's teams (M Samson, paragraph 25). According to Ms Samson, ranger teams operate in areas east of Parnngurr, including the proposed licence area, and are involved in activities such as cleaning out soaks, carrying out traditional burning, hunting and gathering bush tucker, and looking after important places (M Samson, paragraph 27). Mr Sammy states that the ranger program is organised through Karnyirnipa Jukurrpa, a Martu organisation. Ranger trips usually involve a group of senior Martu men (or senior men and women) and a larger group of younger rangers who 'often go out for a week or more at a time and they camp, get all sorts of bush tucker and go hunting, visit the waterholes, do traditional burning and look after country and visit special places including places where people were born or people are buried.' Mr Sammy states that the ranger program is important as a means of teaching young Martu people about country (Sammy Affidavit, paragraph 18). Ranger programs are also operated from

the communities of Jigalong and Punmu, and go out to other parts of Martu country (Sammy Affidavit, paragraph 19).

[44] Mr Sammy describes a trip he made with a group of Martu rangers in 2013, which included male and female rangers. This group travelled from Parnngurr and drove eastwards to a place called Wikari Spring or Midway Well, then south and west to the Warnturr and Timpurr lakes, and finally through the north-eastern part of the proposed licence, where they camped at a claypan known as Marlukajarra, which is on or near the northern boundary of the proposed licence (Sammy Affidavit, paragraph 7). Mr Sammy states that the group camped at a 'few places' throughout the trip, lighting fires as they went, and hunted kangaroo and emu, particularly around the claypan, where there are plenty of kangaroos (Sammy Affidavit, paragraphs 8, 10). While camping at the claypan, the rangers also noticed trees used for making boomerangs, some of which had already been used for that purpose. Mr Sammy observes that this activity is still practiced by members of the native title party (Sammy Affidavit, paragraph 11)

[45] Mr Sammy also states that, on these trips, rangers get water from waterholes and soaks, and he specifically refers to Wikari Spring and a waterhole near Warnturr Lake as water sources (Sammy Affidavit, paragraphs 13-14). Mr Sammy refers to another ranger trip that took place the year before, though he does not state whether the group visited the proposed licence area. Mr Sammy says he is aware of other ranger trips that have gone into that part of the country, but he does not provide any details about these trips or whether they visited the proposed licence area (Sammy Affidavit, paragraphs 9 and 20).

[46] The native title party contends that there is a close relationship between the community and social activities carried on by the native title holders and Martu law and culture, including secret men's and women's sites, burial sites, ceremonial places and artefact scatters associated with those activities. The native title party argues that these community and social activities also encompass the religious and cultural activities of the native title holders and other activities associated with their laws and customs, 'including the regulation of those laws and customs' (NTP Contentions, paragraph 4.8). In this regard, I note Professor Tonkinson's observation that '[t]he Martu way of life, and community and social activities associated with particular areas, are also inextricably linked to care of country, and maintenance and protection of sites and songlines' (Tonkinson Affidavit, paragraph 140).

[47] The native title party also contends that, by allowing the grantee party to access and conduct exploration activity in the proposed licence areas, including the use of vehicles and other machinery, the grantee party will interfere with access by members of the native title party, and consequently their ability to conduct community and social activities in and over those areas (NTP Contentions, paragraph 4.9). Relevantly, I note Mr Sammy deposes that few tracks or roads exist in the proposed licence area, and Martu people have traditionally relied on burning as a means of opening up the country and making it easier to travel through.

[48] The Government party accepts that members of the native title party carry on community activities such as caring for country; hunting and gathering bush tucker, traditional medicines and tools; holding traditional ceremonies, meetings and performing traditional songs and dances; camping; and traditional burning activities in the area of the proposed licences. However, the Government party submits that the evidence regarding burials and births does not establish any 'activities' to which s 237(a) applies.

[49] The native title party contends that, if it is demonstrated that traditional punishments can result from a failure to attend to obligations to look after country consequent upon the conduct of exploration activities, this could constitute direct interference with community or social activities, even in circumstances where the RSHA applies (NTP Contentions, paragraph 3.16). In support of this contention, the native title party relies on the Tribunal's decision in *Champion v Western Australia* at [66]. The Government party submits (at GVP Contentions, paragraph 46) that the Tribunal's conclusion in that matter was that no such interference would arise, in part, due to the presence of a condition requiring an RSHA to be offered. I have already dealt with this issue in *Western Desert Lands v Teck Australia* at [63]-[65], where I held that, though the native title party's interpretation of *Champion v Western Australia* should be accepted, there must nevertheless be evidence that tends to support the conclusion that the act will result in traditional punishment and in turn directly interfere with the conduct of the native title party's community and social activities.

[50] The only evidence relating to traditional punishment is in the affidavit of Professor Tonkinson, where he states that '[o]utsiders entering the wrong parts of country or forbidden places could be punished, as could the Martu traditional owners of the relevant country' (Tonkinson affidavit, paragraph 50). The only place that is identified in the present matter as being an area to which access is forbidden under traditional law and

custom is the Cronin Hill site. As discussed below at [85], I am satisfied the grantee party will take steps to avoid the Cronin Hill site, and there is no evidence regarding the possible impact of traditional punishment on the native title party's community or social activities.

[51] On the issue of interference, the Government party contends (at GVP Contentions, paragraph 72) that, to the extent that the evidence demonstrates that members of the native title party carry out any community or social activities in the proposed licence area, there is not likely to be direct interference with those activities for the following reasons:

(a) The grantee party has stated, in effect, that any ground disturbing activities are intended to be conducted in a way which will not adversely impact heritage sites.

(b) The grantee party has indicated that it will negotiate a heritage protection agreement prior to commencing any ground-disturbing exploration activities. The Government party submits that this is a relevant factor in determining whether there is likely to be interference with community or social activities, and indicates the grantee party's willingness to consult with the native title party to avoid interference. The native title party also has the opportunity of enforcing this expression of intention by invoking the proposed RSHA condition.

(c) The proposed licence area has been subject to prior mineral exploration. If the proposed licence will have any effect on community and social activities, it will be to no additional extent than these earlier exploration activities have already affected, and continue to affect, those community and social activities. The activities proposed by the grantee party are almost identical to those previously conducted by Caldera.

(d) The native title party's evidence does not clearly delineate between the activities conducted within the proposed licence and those conducted in close proximity. Though the grantee party and the native title party may come across one another from time to time in the course of their activities in the proposed licence area, it is not apparent that the community or social activities of the native title party will thereby be prevented or disrupted to a significant extent.

(e) Mr Sammy indicates that the area in which activities such as camping and hunting are conducted covers a 'huge part' of the area of Martu country and the proposed

licence comprises less than 0.002 per cent of the total determination area. It is therefore highly unlikely that the grantee party and the native title party would come into contact on a regular or semi-regular basis while the native title party is conducting social or community activities.

(f) There are no Aboriginal communities within the proposed licence area, and the closest community (Parnngurr) is situated approximately 80 kilometres from the proposed licence area and it takes between two to three hours and one day to travel there by car. Although the native title party may access the area during ranger trips, it is not clear how often these trips are conducted.

(g) Hunting and mineral exploration are, by their nature, inherently capable of coexistence.

(h) Given the limited nature of the rights conferred by the proposed licences, there is little prospect of the native title party's access being prevented in any substantial way, and the grantee party has evinced no intention to restrict access to the proposed licence area and has indicated that it will keep Martu people informed of its planned operations.

(i) To the extent activities conducted by the native title party consist of law ceremonies, the activities of the grantee party will only potentially intersect with them in the limited period during which law business is held. The Government party concedes (at paragraph 50(i)) that a small possibility may exist that the grantee party could inadvertently approach near a ceremony while it is occurring, but notes the grantee party's stated intention to comply with its legal obligations and to respect and accommodate Aboriginal cultural issues. The Government party submits that the Tribunal may infer that, so long as the grantee party is made aware of the location and time of ceremonies, it is not likely to conduct its operations in a way which interferes with the ceremony or the privacy of the participants.

[52] The grantee party states that it will provide Martu people with details of all planned exploration prior to commencement and give written notice of any intention to enter the area for the purpose of non-ground disturbing activities (GP Contentions, paragraphs 12 and 18). The grantee party states that it will consult with Martu people to ensure that disturbance to land is minimised and will not impact on significant sites or local

communities (GP Contentions, paragraphs 5 and 11). The grantee party will seek to negotiate a heritage protection agreement prior to commencing ground disturbing works, and intends to rehabilitate any disturbance to the land following the completion of exploration (GP Contentions, paragraph 15).

Consideration of s 237(a)

[53] There is evidence that members of the native title party carry on a range of community and social activities, including hunting and gathering bush tucker and medicine, teaching young people about country and culture, and caring for country activities such as cleaning out soaks and traditional burning, over an area that includes the proposed licence area. This is accepted by the Government party, and the grantee party has not sought to contest the evidence presented by the native title party. The evidence suggests that this larger area extends from Well 23, which is situated approximately 25 kilometres north of the proposed licence, to Warnturr lake, approximately 25 kilometres south-east of the land and waters concerned. There are also indications that the areas around Wells 23 and 24 are particularly favoured in terms of camping and hunting. This is consistent with the proximity of these sites to the Canning Stock Route, which Ms Samson says is used often by members of the native title parties (M Samson Affidavit, paragraph 26).

[54] Mr Sammy describes activities undertaken at the Marlukajarra claypan on or near the northern border of the proposed licence during a recent ranger trip. Although the claypan is illustrated on a map annexed to Mr Sammy's affidavit, it is difficult to ascertain whether it is actually situated on the land or waters that would be subject to the proposed licence. Whatever the case, I accept that activities carried on by members of the native title party at the claypan and surrounding areas are capable of being affected by activities undertaken by the grantee party due to the claypan's proximity to the proposed licence area.

[55] Nonetheless, I do not consider the grantee party's activities are likely to substantially interfere with hunting or gathering at the claypan or other areas within the proposed licence. Although I acknowledge Mr Sammy's evidence that the claypan is considered a good area for hunting kangaroos, I do not accept this is the only (or even the main) area where kangaroos are found and hunted by members of the native title party. Rather, the evidence indicates that the living areas around the wells to the north of the proposed licence and those around the lakes to the south-east are all regarded as being rich in bush

tucker, claypans and soaks. It is not suggested that the claypan or other areas within or in close proximity to the proposed licence are particularly important places for hunting and gathering.

[56] Although the evidence of Mr Sammy indicates that some use is made of the proposed licence area, it does not support an inference that the area is regularly utilised by members of the native title party for the purposes of hunting and gathering. Similarly, while I accept that Martu people are involved in teaching young people about country through the ranger program, the evidence of Ms Samson suggests these activities are generally carried on in the areas east of Parnngurr, and there is no evidence to suggest they are associated with particular places within the proposed licence area. To the extent the native title party does carry on these activities within the proposed licence area, I accept that the grantee party's activities are unlikely to obstruct or restrict the native title party's access to the area for these purposes, either directly in the course of its operations or as a result of any works conducted on the land, especially given the requirements for rehabilitation and the grantee party's own undertakings to consult with Martu people about access and remediation. I have reached the same conclusion in relation to activities involving the maintenance of soaks and claypans.

[57] The evidence of the native title party refers to two activities associated with specific locations within, or in close proximity to, the proposed licence area. The first is discussed in reference to the Marlukajarra claypan, where Mr Sammy deposes to observing trees that are, and had been used, for making boomerangs. The second is mentioned in the context of the Cronin Hills site, which is an increase site for people who possess a particular status in Martu society. I discuss the Cronin Hills site in further detail in relation to s 237(b); however, I make the following observations in relation to these places. First, it is not suggested that the claypan is the only place where such trees can be found. Second, to the extent that some of the trees have already been used to make boomerangs, they may be sites to which the AHA applies. Third, the activities of the grantee party are unlikely to significantly affect the Martu people's access to the Cronin Hills site, though I acknowledge the possibility that disturbing the site may also have an effect on the conduct of rituals associated with the site. Fourth, the grantee party intends to consult with the Martu people about its exploration program and plans to focus on areas of sparse

vegetation. For these reasons, I find that the grant of the proposed licence is unlikely to directly interfere with these activities.

[58] Mr Sammy states that rangers go onto country to visit special places, including places where people were born or are buried (Sammy Affidavit, paragraph 18). Ms Samson also refers to protecting these and other places such as camping places and ceremonial grounds, though she does not describe what this involves in terms of a concrete activity (M Samson Affidavit, paragraph 32). I accept that, due to the nature of the area and its use as a living area, it is possible a number of birth or burial sites can be found within the proposed licence area, though only one place has been specifically identified. However, I do not consider the activities proposed by the grantee party will directly interfere with these activities, especially in circumstances where the target area has previously been subject to heritage clearance procedures and the grantee party intends to consult with the native title party prior to further ground-disturbing work.

[59] In *Western Desert Lands v Teck Australia* (at [78]-[84]), I considered evidence from the native title party regarding traditional burning activities. In that matter, I concluded there was a real likelihood that the grant of exploration licences would interfere with these activities if the grantee party did not consult with the native title holders before entering the area, at least during the times of year when burning is carried on. In the present matter, there is some evidence that traditional burning is carried out through the ranger program in areas east of Parnngurr, and Mr Sammy refers to rangers burning the country as they travelled towards the proposed licence from the lakes to the south-east. On this basis, I am prepared to infer that traditional burning activities are carried on from time to time within the proposed licence area.

[60] Nevertheless, the circumstances of the present case can be distinguished from those in *Western Desert Lands v Teck Australia*. In that matter, the grantee party gave no indication of whether it planned to consult the native title party in relation to access. Although the Government party had indicated it would impose a condition requiring the grantee party to offer the Central Desert RSHA if requested by the native title party, I considered the notice provisions were inadequate to remove the risk of interference with traditional burning activities. In the present case, the grantee party has undertaken to consult with the Martu people in relation to any proposed exploration and provide written notice prior to entering the proposed licence area. Although this is not a binding commitment, there is no reason to

conclude that the grantee party will depart from its stated intentions. If the grantee party were to breach any undertaking made in the course of this inquiry, this would likely support an adverse inference in later proceedings. For present purposes, I accept that the grantee party is sincere in its intention to consult with the native title party about access, and I am satisfied that arrangements can be made to avoid any interference with traditional burning activities.

[61] In conclusion, I find that the grant of the proposed licence is not likely to directly interfere with the 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)

[62] The native title party contends that the proposed licence area is intersected or affected by songlines and associated sites and areas of particular significance. The native title party contends that many of these sites and areas are not readily identifiable by non-Martu people, and include gender-restricted sites (NTP Contentions, paragraph 4.13). The native title party submits that the proposed licence contains 'site rich' areas and other areas of particular significance that militate against the application of a 'presumption of regularity' in favour of the grant (NTP Contentions, paragraph 4.15).

[63] The native title party also contends that the fabric of the country within, and in close proximity to, the proposed licence is imbued with such particular significance that any entry onto the relevant land which has not been agreed with the native title party would be likely to result in interference within the meaning of s 237(b) (NTP Contentions, paragraph 4.18). Furthermore, the native title party submits that its members have obligations to maintain and protect sites of particular significance, as well as responsibilities to members of the wider Western Desert Cultural Bloc, and any damage or disturbance to significant sites or areas would have repercussions for members of the native title party and the integrity of the wider Aboriginal society of which they form part (NTP Contentions, paragraphs 4.16 and 4.17).

[64] The Martu Men describe three songlines or dreaming stories that travel through the proposed licence area and another which travels further to the east (Martu Men Affidavit, paragraphs 11-16). One of these songlines is linked to a site at Cronin Hills, which is

located near the centre of the proposed licence area. The songline also connects the area to the Warnturr and Timpirr lakes located to the south-east of the proposed licence area (Martu Men Affidavit, paragraphs 17-20).

[65] The site at Cronin Hills is described as an increase site for Martu people who possess a particular status (Martu Men Affidavit, paragraph 21; M Samson Affidavit, paragraph 9). The Martu Men depose that the site at Cronin Hills is 'dangerous for women and children' and only men can enter the site, though it is unclear whether access is restricted to men who have been initiated under Martu law and custom (Martu Men Affidavit, paragraph 22). Ms Samson states that a mining company would need to be accompanied by Martu people and a person who holds the particular status (M Samson Affidavit, paragraph 16). Ms Samson also states that people in the community could be affected if the wrong person went to the hill or it was damaged or destroyed (M Samson Affidavit, paragraph 15).

[66] Ms Samson deposes that the area within the proposed licence is a 'big living area' and 'has many areas that [*sic*] our Martu people are buried, and their burial places must not be touched.' Ms Samson states that only Martu people can identify these places so they can be protected (M Samson Affidavit, paragraph 20). Mr Sammy and the Martu Men also refer to a burial place near the Marlukajarra claypan (Sammy Affidavit, paragraph 15; Martu Men Affidavit, paragraph 25).

[67] The Martu Men depose to the existence of a number of other, unidentified sites in the areas surrounding the proposed licence, and say the proximity of these sites to the proposed licence area means they will be affected by any exploration carried out without proper permission from Martu people (Martu Men Affidavit, paragraph 9).

[68] The Government party contends that the Cronin Hills site is the only site or area within the proposed licence area that is said to be of particular significance as a result of the intersection of songlines or the movement of *jukurrpa* and is identified with any specificity as to its location. The Government party submits that, in most cases, the only sites identified with any specificity in the evidence of the native title party are situated outside the proposed licence area (GVP Contentions, paragraph 89). The Government party submits that an area or site of particular significance must mean an area which stands out in some way from the general background of other sites and the country as a whole, and general evidence regarding the existence or possible existence of places on or near the

proposed licence area which may be said to fall within a generic category is not sufficient to establish the existence of areas or sites of particular significance (GVP Contentions, paragraph 90).

[69] The Government party does not accept the native title party's contention that the area is 'site rich' and disputes the forensic value of the term to the predictive assessment required to be taken by the Tribunal (GVP Contentions, paragraphs 91-92). The Government party also does not accept the contention that any entry into or impact within an area may cause direct interference with that area, and submits that the question of whether or not something interferes with an area or site is a matter of evidence. Furthermore, the Government party does not accept the contention that a lack of consultation with native title holders before entering land or doing an activity amounts to interferences for the purposes of s 237(b) (GVP Contentions, paragraph 93).

[70] In the event the evidence establishes the existence of areas or sites of particular significance within the proposed licence area, the Government party submits (at GVP Contentions, paragraph 94) that interference is unlikely for the following reasons:

(a) To the extent that the site at Cronin Hills and the songlines are sites of particular significance, the grantee party is aware of their existence and its legal obligations in respect of those sites. The grantee party has indicated its sensitivity to the concerns of the native title party and intends to implement measures to avoid the possibility of interference. The native title party also has the opportunity of enforcing these intentions by invoking the proposed RSHA condition.

(b) The native title party overestimates the effect of the activities proposed by the grantee party. If the general assertion that any entry or ground disturbance within a tenement area were sufficient to displace the expedited procedure, then it would not apply to the grant of almost all exploration tenure in the vast majority of Australia, which would be incongruent with the Parliament's intention in enacting s 237 of the Act.

(c) The native title party's evidence and submissions regarding songlines reflect a general spiritual concern to which s 237(b) does not apply, as there is no specific evidence of an identified area or site to which the concern relates. To enliven

s 237(b), any spiritual or emotional concerns must attach to physical interference with an identified area or site of particular significance.

(d) The proposed licence area has been subject to prior mineral exploration and possibly mining activity, and the activities contemplated by the grantee party would be the same as, or no more significant than, the previous use of the area, particularly the works conducted by Caldera.

(e) The AHA and its associated processes are likely to prevent interference with any area or site of particular significance.

[71] The grantee party undertakes to establish dialogue with the Martu People and negotiate a heritage protection agreement prior to commencing any ground disturbing activities (GP Contentions, paragraph 10). The grantee party states that it understands that the land is culturally important to the Martu People and may contain sites that are not recorded on the DAA Database (GP Contentions, paragraph 6). The grantee party undertakes to keep the Martu People informed of its planned operations and give them written notice prior to entering the area for the purpose of non-ground disturbing activities (GP Contentions, paragraph 12).

Consideration of s 237(b)

[72] On the basis of the evidence presented in this matter, I accept that the site at Cronin Hills is a site of particular significance to the native title holders. I am satisfied that the site has been identified to the requisite degree and the basis of the site's significance in traditional law and custom has been clearly outlined and explained.

[73] In relation to the evidence regarding the *jukurrpa* or songlines said to traverse the proposed licence area, I note the distinction drawn by Member O'Dea in *WF v Emergent Resources* at [39] between areas of country understood as generally formed by the movement of mythic beings in the creative epoch and areas or locations associated with the specific activities of mythic beings. Although that matter concerned an exploration licence in another claim area, the distinction was drawn in relation to the 'wider jural Martu public' and other peoples of the Western Desert Bloc. In *Yindjibarndi Aboriginal Corporation v FMG Pilbara* at [130], President Webb placed this distinction on a wider footing, noting that s 237(b) requires the Tribunal to distinguish between areas and sites which are

generally culturally significant and *specific* culturally significant areas and sites which are of *particular* significance.

[74] Depending on the evidence presented in a particular matter, songlines or dreaming tracks may be regarded as sites or areas of particular significance (see *Freddie v Western Australia* at [45]-[47]; *Lungunan v Geotech International* at [41]). In *Freddie v Western Australia*, Deputy President Sumner suggested that specific parts of a dreaming track might be considered sites of particular significance whereas other parts might not (at [47]). That, of course, is subject to the general requirement that the location of an area or site and the nature of it significance must be identified before it can be accepted as an area or site of particular significance (see *Western Australia v McHenry*; *Silver v Northern Territory* at [91]; *WF v Emergent Resources* at [68]).

[75] In the present matter, the Martu Men give the following evidence regarding songlines or dreaming tracks that are said to travel through the proposed licence area:

(a) *W songline*: this songline travels from lakes to the north, through the proposed licence area, further south, and then to the east and north again. It is an important Martu songline and parts of the stories associated with the songline are secret to initiated men (Martu Men Affidavit, paragraph 11).

(b) *N dreaming*: this story describes the travels of a dreamtime people who followed a 'broad path as far south as Lake Disappointment' that 'took them through' the proposed licence area (Martu Men Affidavit, paragraph 16).

(c) *WK dreaming*: the story relates to mythical beings that travelled all over Martu country in zig-zig fashion. The site at Cronin Hills is associated with the WK dreaming, and the Timpirr and Warnturr Lakes are also connected with the story (Martu Men Affidavit, paragraphs 14-15, 19-20).

[76] The Martu Men also describe a dreaming story that relates to an area of country to the east of the proposed licence (Martu Men Affidavit, paragraph 14).

[77] With the exception of the Cronin Hills site, the evidence does not establish that the songlines or dreaming stories are associated with any specific locations within the proposed licence area. Although I accept that the songlines or stories may traverse areas

within the proposed licence, I am not satisfied those areas are therefore areas of particular significance to the native title holders.

[78] With regard to the burial site at Marlukajarra claypan and the other unspecified burial sites, I note my comments in *Western Desert Lands v Teck Australia* at [131] and the cases cited therein. As in that matter, I acknowledge the significance of the claypan site to the relatives of the deceased, but I am not satisfied the site stands out in the way contemplated by s 237(b). As there is no evidence regarding the location or significance of other burial sites that may be located within or in close proximity to the proposed licence area, I am unable to find that any of these places are areas or sites of particular significance within the meaning of s 237(b).

[79] In relation to the evidence regarding areas or sites outside the proposed licence area, the Tribunal is entitled to consider any effect the grantee party's activities are likely to have on those areas or sites, provided there is a clear nexus between the activities and the issues being considered under s 237(b): see *Silver v Northern Territory* at [35]. In the present case, the only sites that are specifically identified are the Timpirr and Warnturr lakes. Although the Martu Men refer to the connection between the lakes and the WK dreaming, their evidence does not support a finding that the lakes are areas or sites of particular significance, and there is little to suggest that the relevant nexus exists between the activities proposed by the grantee party and interference with the lakes.

[80] As for the native title party's contention that the area is 'site rich' and requires a different approach to the assessment of risk, I note my comments in *Western Desert Lands v Teck Australia* at [103]-[104] and the cases cited therein. The evidence in the present matter indicates that the area within the proposed licence may be generally significant to the native title holders, given the existence of songlines and its proximity to Lake Disappointment to the east, but it does not establish that the entire area is one of particular significance to the native title holders. Nor does the evidence suggest that the nature, number or distribution of sites is such that any entry into the area by the grantee party is likely to cause interference of the kind contemplated by s 237(b).

[81] As I have concluded that the Cronin Hills site is one of particular significance for the purposes of s 237(b), it is necessary to consider whether the grant of the proposed licence is likely to interfere with the site. Although the interference must be physical in nature, the

question of whether a particular activity is likely to interfere with an area or site will depend on the nature of the site, the nature of the activity, and the laws and customs of the native title holders: *Silver v Northern Territory* at [88].

[82] The evidence of the Martu Men establishes that the Cronin Hills site is considered dangerous for women and children. The Martu Men depose that 'only men can go right into the place,' though women and children 'can walk around the place OK' (Martu Men Affidavit, paragraph 22). Elsewhere, the Martu Men state that the place is 'secret to initiated men' and '[a]ny initiated man can go in,' but do not state whether it is also dangerous for non-initiated or non-Aboriginal men to enter the site (Martu Men Affidavit, paragraphs 22-23). Ms Samson states that a mining company would need to have Martu people to guide them to make sure the site is not disturbed. Although this statement is not specifically directed to the issue of access, Ms Samson does say she knows of non-Martu people who have died 'because they have gone where they must not go' (M Samson Affidavit, paragraph 16).

[83] The native title party contends that the regulatory regime established under the AHA and the RSHA fail to address the implications of highly sensitive and gender-restricted sites, and the nature of the sites in question reduces the utility of an endorsement on the grant drawing the grantee party's attention to the AHA (NTP Contentions, paragraphs 4.18(j) and 4.19). In *Western Desert Lands v Teck Australia*, I accepted that the Central Desert RSHA did not adequately deal with the possibility of interference by access (at [112]). Although the Government party is here proposing a condition requiring the grantee party to offer the YMAC RSHA at the native title party's request, it is apparent from the terms of the YMAC RSHA that the result would likely be the same. Similarly, though I did not accept the native title party's contentions regarding the efficacy of the regulatory regime, I acknowledged that the AHA may not always provide sufficient protection in every case (see *Western Desert Lands v Teck Australia* at [114], [117]-[119]).

[84] Nevertheless, there are important distinctions between the findings in *Western Desert Lands v Teck Australia* and the present circumstances. In that matter, there was evidence of a number of areas or sites of particular significance, many of which could not easily be identified by non-Martu people. In the present case, the evidence only establishes the particular significance of the Cronin Hills site. Cronin Hills is a recorded geographical feature and can in all likelihood be identified with a fair degree of precision. Although Ms

Samson says there may be problems if the grantee party gets too close to the site, the Martu Men clearly state that it is okay for women and children to walk around the site, though only initiated men can enter it. On this basis, I infer that the grantee party is unlikely to interfere with the site unless it approaches or enters the hills.

[85] The other important distinction is the attitude of the grantee party. In *Western Desert Lands v Teck Australia*, I noted that the material provided by the grantee party was not particularly informative about the activities it proposed to undertake or how it planned to avoid interference with significant areas or sites. In the present matter, the grantee party has indicated that its exploration program will focus primarily on areas previously explored by Caldera. The grantee party has also undertaken to keep the native title party informed of its planned operations and consult with them regarding its exploration activities. In the circumstances, I accept that the grantee party will take steps to avoid the Cronin Hills site and will consult with the native title party to ensure that the site is not interfered with as a result of the proposed exploration.

[86] In light of the grantee party's awareness of the Cronin Hills site, the nature of the site, and the grantee party's attitude towards consultation and heritage protection, I accept there is no real risk that the grant of the proposed licence will lead to interference with areas or sites of particular significance.

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

Contentions and evidence in relation to s 237(c)

[87] The native title party argues that the activities permitted by the proposed licence are likely to result in soil and water erosion, changes to land contours, damage to bush and other natural habitats, interruption and diversion of natural water flows and impacts on the natural ambience of the land (NTP Contentions, paragraph 4.20). In the native title party's submission, the Tribunal should have regard to the existence of numerous sites and areas of particular significance within the proposed licence area, including sensitive and gender-restricted sites, which are connected to underlying *jukurrpa* that connect the proposed licence area to other areas in Martu country; the proximity of the Parnngurr community; and the relationship between the community and social activities carried on by members of the native title party and sensitive or gender-restricted sites within the proposed licence area (NTP Contentions, paragraph 4.20). The native title party contends that, having regard

to those matters and the law and custom of the native title holders, even activities that could be described as 'low impact exploration' could reasonably be regarded as major disturbance to the land and waters concerned (NTP Contentions, paragraph 4.21).

[88] Ms Samson deposes that the area is rich in claypans and soaks, which members of the native title party continue to look after. Ms Samson states that, if members of the native title party do not look after these places, then 'our Dreaming and sacred places become weak and we become weak' (M Samson Affidavit, paragraph 24). Ms Samson says that bush onion and bush tomato are found in the area, and these places must be protected (M Samson Affidavit, paragraph 28). Important medicines are also found around the claypans and soaks, and are still relied on by members of the native title party (M Samson Affidavit, paragraph 29). Ms Samson also states that the area is full of artefacts, camping places, ceremonial grounds and burial places, and these places must never be disturbed (M Samson Affidavit, paragraph 32). Mr Sammy also describes the proposed licence area as being 'part of a large living area for Martu people for as long as anyone can remember' and says 'there are likely to be burial sites' in the area (Sammy Affidavit, paragraph 16). According to Mr Sammy, 'Martu people would be worried that the exploration company would spoil the waterholes with their drill rigs and other equipment' (Sammy Affidavit, paragraph 23).

[89] The Government party contends that the possible impact of the exploration on 'underlying *Jukurrpa*' or the relationship between community activities and certain sites is irrelevant to whether there will be physical disturbance to land or waters (GVP Contentions, paragraph 105). The Government party argues that the relevant primary assessment involved in an inquiry under s 237(c) relates to the impact of the future act on the land and waters. While cultural or spiritual aspects may be considered, there must be some physical attribute or characteristic of the disturbance (GVP Contentions, paragraph 106). Alternatively, the Government party contends (at GVP Contentions, paragraph 107) that the grant of the proposed licence not likely to involve major disturbance for the following reasons:

(a) The grantee party intends to conduct its activities in a way that will not adversely affect heritage sites and will respect local Aboriginal cultural concerns.

(b) The grantee party's rights under the proposed licence 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.

(c) Any authorised disturbance may be mitigated by conditions requiring rehabilitation.

(d) The area has been subject to prior mineral exploration and possibly mining, and the activities contemplated by the grantee party would be the same as, or no more significant than, the previous use of the area.

(e) It does not appear the area has any particular characteristics that would be likely to result in major disturbance given the activities proposed by the grantee party.

[90] The grantee party states that it will consult with Martu people prior to commencing exploration 'to ensure any disturbance to the land is kept to the bare minimum' and 'does not impact upon sites of significance or the local communities' (GP Contentions, paragraph 11). The grantee party undertakes to establish dialogue with the Martu People and negotiate a heritage protection agreement before commencing any ground-disturbing work in the proposed licence area (GP Contentions, paragraph 10).

Consideration of s 237(c)

[91] Whether a future act is likely to involve, or create rights whose exercise is likely to involve, major disturbance to land or waters is to be assessed from the viewpoint of the general community (see *Little v Oriole Resources* at [52]-[54]). The Tribunal will take into account the views of the local Aboriginal community in determining the likely degree of disturbance, but only to the extent they relate to any direct physical disturbance associated with the act (see *Rosas v Northern Territory* at [84]).

[92] The grantee party plans to undertake a trenching program in an area previously explored by Caldera. This program will involve the excavation of several trenches located 300 to 400 metres apart, with the aim of extracting up to two tonnes of material for processing. The work will be carried out using an excavator transported to the area using a low loader along existing tracks or an alternative path agreed with the native title holders. The grantee party indicates that it plans to continue exploration over the remaining areas, beginning with airborne magnetic surveys, mapping and ground reconnaissance sampling to determine other potential drill sites.

[93] The native title party contends that, in the context of evidence regarding significant sites, underlying *jukurrpa*, the proximity of the Parnngurr community and the relationship of community and social activities to particular sites of significance, even low impact exploration may be regarded as major disturbance. As I have already determined that the grantee party's activities are unlikely to interfere with the native title party's community or social activities or with sites or areas of particular significance to the native title holders, I am unable to accept that contention. It is possible that drilling or trenching near the Cronin Hills site could amount to major disturbance within the meaning of s 237(c); however, I accept that the grantee party will consult with Martu people to avoid interference with sites of this kind.

[94] The Tribunal has previously considered that trenching does not, as a general rule, constitute major disturbance to land or waters (see for example *Coolibah v Ashton Mining*). In the present case, the target area has already been the subject of previous exploration, which was apparently carried out after consultation with Martu people. It is possible that further trenching or drilling may follow the additional reconnaissance work that will be undertaken by the grantee party over other areas; however, there is nothing to suggest these activities will involve major disturbance to the particular land or waters concerned. In reaching that finding, I have also taken into account the operation of the relevant regulatory regimes and, in particular, the conditions that will be imposed requiring rehabilitation at the completion of operations.

[95] Ms Samson and Mr Sammy refer to the likelihood that burial sites exist throughout the area extending from the wells in the north to the lakes in the east, including the proposed licence area. As I found in *Western Desert v Teck Australia* at [152], this is consistent with the general significance of the area and its historical occupation by Martu people, and I accept that disturbance to these sites could amount to major disturbance for the purposes of s 237(c). However, as the grantee party intends to consult with Martu people and enter into a heritage protection agreement before commencing any ground disturbing works, I consider the possibility of damage to burial sites unlikely, if not remote.

[96] Mr Sammy refers to the possible effect on waterholes. I appreciate the general significance of waterholes to the community life of the native title holders. However, it is likely these places can be identified and avoided through a process of consultation. The endorsements on the licence proposed by the Government party will provide an additional level of

protection by placing the grantee party on notice about its obligations under State water management legislation.

[97] In the circumstances, I find that the proposed licence is not likely to involve, or create rights whose exercise is likely to involve, major disturbance to the land and waters concerned.

Determination

[98] The determination of the Tribunal is that the grant of exploration licence E45/3637 to MDR (Thomsons) Pty Ltd is an act attracting the expedited procedure.

James McNamara
Member
8 September 2014