NATIONAL NATIVE TITLE TRIBUNAL

***Yindjibarndi Aboriginal Corporation RNTBC* v *FMG Pilbara Pty Ltd and Another* [2014] NNTTA 8 (17 January 2014)**

Application No: **WO2012/1368**

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

- and -

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

Yindjibarndi Aboriginal Corporation RNTBC (as Trustee for, and on behalf of, the Yindjibarndi People) (native title party)

- and –

FMG Pilbara Pty Ltd (grantee party)

- and -

The State of Western Australia (Government party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: President Raelene Webb QC, Member
Place: Perth
Date: 17 January 2014

Catchwords: Native title – future acts – proposed grant of an 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: *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), ss 9, 10, 12

Acts Interpretation Act 1901 (Cth) s 36

Native Title Act 1993 (Cth), ss 29, 30, 31, 32, 76, 77, 84B, 148, 109(1), 151(2), 155, 237

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

Mining Act 1978 (WA), ss 61, 66

Cases:

Albert Little and Others on behalf of Badimia/Western Australia/Lake Moore Gypsum Pty Ltd, [2012] NNTTA 56 (‘*Little v Lake Moore Gypsum’*)

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

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 (‘*Champion v Western Australia*’)

Cheedy v Western Australia (2011) 194 FCR 562 (‘*Cheedy v Western Australia’*)

Cheinmora v Striker Resources NL; Dann v State of Western Australia (1996) 142 ALR 21 (*‘Cheinmora v Striker Resources’*)

Cyril Barnes and Others on behalf of the Central East Goldfields People/Western Australia/AngloGold Ashanti Australia Ltd; Independence Group NL [2013] NNTTA 17 (*‘Barnes v AngloGold Ashanti Australia’*)

Daisy Lungunan and Others on behalf of the Nyikina and Mangala People/Karajarri Traditional Lands Association (Aboriginal Corporation)Western Australia/Geotech International Pty Ltd [2013] NNTTA 129 (‘*Lungunan v Geotech International*’)

Daniel v Western Australia [2005] FCA 536 (*‘Daniel v Western Australia’*)

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

Freddie and Others v Western Australia (2007) 213 FLR 247 (‘*Freddie v Western Australia’*)

FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia [2011] NNTTA 107 (‘*FMG Pilbara v Yindjibarndi*’)

Jack Dann & Ors (Unggumi Ngarinyin)/State of Western Australia/GPA Distributors Pty Ltd [1995] NNTTA 43 (*‘Dann v GPA Distributors’*)

Kevin Cosmos on behalf of the Yaburara & Mardudhenera/Western Australia/Croydon Gold Pty Ltd, [2013] NNTTA 86 (‘*Cosmos v Croydon Gold’*)

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

Little v Oriole Resources Pty Ltd (2005) 146 FCR 576; [2005] FCAFC 243 (‘*Little v Oriole Resources No 2*’)

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

Mabo v Queensland (No 2) (1992) 175 CLR 1 (*‘Mabo v Queensland (No 2)’*)

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

Maitland Parker & Ors/Iron Duyfken Pty Ltd [2010] NNTTA 60 (*‘Parker v Iron Duyfken’*)

Maureen Young on behalf of the Ngadju People/Western Australia/South Coast Metals Pty Ltd [2001] NNTTA 42 (*‘Young v South Coast Metals’*)

Moses v State of Western Australia (2007) 160 FCR 148; FCAFC 78 (‘*Moses v Western Australia’*)

NC (deceased) v State of Western Australia [2012] FCA 773 (‘*NC (deceased) v Western Australia*’)

Parker on behalf of the Martu Idja Banyjima People v State of Western Australia [2007] FCA 1027 (‘*Parker v Western Australia*’)

Raymond Ashwin & Ors on behalf of Wutha/Western Australia/Kubwa Iron Ore Holdings Pty Ltd, [2013] NNTTA 44 (‘*Ashwin v Kubwa Iron Ore Holdings’*)

Re Cheinmora (1996) 129 FLR 223 (‘*Re Cheinmora’*)

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

Smith v Western Australia (2001) 108 FCR 442 (‘*Smith v Western Australia*’)

Teelow v Page (2001) 166 FLR 266; [2001] NNTTA 107 (*‘Teelow v Page’*)

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

Walley v Western Australia (2002) 169 FLR 437 (‘*Walley v Western Australia*’)

Ward v Western Australia (1996) 69 FCR 208 (‘*Ward v Western Australia*’)

Western Australia/Judy Hughes & Others on behalf of the Thalanyji People, Ronald Crowe and Others on behalf of Gnulli/Rough Range Oil Pty Ltd [2004] NNTTA 108 (‘*Western Australia v Hughes*’)

Western Australia v Smith (2000) 163 FLR 32 (‘*Western Australia v Smith’*)

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

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

Wilfred Goonack and Others on behalf of Uunguu/Western Australia/Geotech International Pty Ltd and Timothy Vincent Tatterson [2009] NNTTA 72 (*‘Goonack v Geotech International’*)

Yindjibarndi Aboriginal Corporation/Croyden Gold Pty Ltd [2013] NNTTA 71 (‘*Yindjibarndi v Croyden Gold’*)

Yindjibarndi Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd, [2013] NNTTA 150 (‘*Yindjibarndi v FMG Pilbara’*)

Representatives of the native title party:	Mr George Irving, Yindjibarndi Aboriginal Corporation Ms Christina Araujo, Yindjibarndi Aboriginal Corporation
Representative of the grantee party:	Mr Kenneth Green, Green Legal Pty Ltd
Representatives of the Government party:	Ms Caitlin Martin, State Solicitor’s Office Mr Clyde Lannan, Department of Mines and Petroleum

REASONS FOR DETERMINATION

[1] FMG Pilbara Pty Ltd ('the grantee party') applied for exploration licence E47/1397 ('the proposed licence') on or about 8 April 2004. On 22 August 2012, the Government party gave notice under s 29 of the *Native Title Act* 1993 (Cth) ('the Act') of its intention to grant the proposed licence to the grantee party ('the s 29 notice'). In the s 29 notice, the Government party included a statement that it considers that the grant attracts the expedited procedure (that is, that the grant of the proposed licence is an act that can be done without the normal negotiations required by s 31 of the Act).

[2] According to the s 29 notice, the proposed licence comprises 69 graticular blocks and is located 58 kilometres north-west of Wittenoom in the Shire of Ashburton, Western Australia. According to both the Government party and the grantee party, the proposed licence covers approximately 218.81 square kilometres.

[3] The s 29 notice states that if the proposed licence were to be granted, it would authorise the holder to explore for minerals for a term of five years from the date of grant. Any person who is a registered native title claimant in relation to any of the land or waters covered by the proposed licence within the period of four months after the notification day is a native title party who may, within that four month period, lodge an objection with the National Native Title Tribunal ('the Tribunal') against the inclusion of the expedited procedure statement in the s 29 notice (see s 32(3) of the Act). The notification date advised in the notice was 22 August 2012, with the four month period for objection closing on 22 December 2012. By the operation of s 36(2) of the *Acts Interpretation Act* 1901 (Cth) the closing date for lodging an objection became 24 December 2012, the next working day.

[4] The Ngarluma Yindjibarndi native title determination application (WAD6017/1996) was the subject of a determination of native title by the Federal Court in *Daniel v Western Australia* on 2 May 2005, as varied by the Full Federal Court in *Moses v Western Australia* on 27 August 2008. The Ngarluma Yindjibarndi native title determination area covers just under 24,500 square kilometres, with the Yindjibarndi portion of that determination area being approximately 10,320 square kilometres. A significant part of the proposed licence (87.4 percent) falls within the external boundaries of the Yindjibarndi portion of the Ngarluma Yindjibarndi determination area.

[5] The Yindjibarndi Aboriginal Corporation RNTBC holds the native title rights and interests in the Yindjibarndi portion of the Ngarluma Yindjibarndi determination area in trust for the Yindjibarndi People. The Yindjibarndi Aboriginal Corporation RNTBC constitutes a native title party under s 30 of the Act.

[6] On 21 December 2012, the Yindjibarndi Aboriginal Corporation RNTBC on behalf of the Yindjibarndi People lodged an objection with the Tribunal against the inclusion of the expedited procedure statement: see s 32(3) of the Act. This expedited procedure objection application was accepted by Member Shurven on 30 January 2013 pursuant to s 77 of the Act and Member Shurven was appointed as the member for the purpose of determining, pursuant to s 32(4) of the Act, whether the grant of the proposed licence is an act attracting the expedited procedure. On 27 August 2013, due to Member Shurven's absence on leave, I appointed myself as the Member to inquire and to make that determination.

[7] The area of the Yindjibarndi #1 People native title determination application (WC2003/003; WAD6005/2003) also overlaps the proposed licence area by approximately 12.6 percent. On 21 December 2012, the Yindjibarndi Aboriginal Corporation RNTBC, stating they were acting as agent for the Applicant in the Yindjibarndi #1 People native title claim, lodged an objection with the Tribunal against the inclusion of the expedited procedure statement. On 11 January 2013, Member Shurven decided not to accept this expedited procedure objection application on the basis that, at the relevant point in time, the application had not been made by the applicant or representative as defined in s 84B of the Act.

[8] It follows that the only expedited procedure objection in respect of the proposed licence which is before the Tribunal relates to that part of the proposed licence which overlaps with the Yindjibarndi portion of the Ngarluma Yindjibarndi determination area. The Yindjibarndi Aboriginal Corporation RNTBC is the native title party for the purposes of this inquiry.

[9] On 13 June 2013, in accordance with standard practice, directions were issued requiring parties to provide contentions and evidence for an inquiry to determine whether or not the expedited procedure is attracted. In accordance with the directions of 13 June 2013, the native title party was due to provide its contentions and supporting documents on 5 August 2013. On the next day, 6 August 2013, the Government party applied pursuant to s 148(b) of the Act for the dismissal of the expedited procedure objection application.

[10] Section 148(b) of the Act provides that the Tribunal may dismiss an application, at any stage of an inquiry if the applicant fails within a reasonable time to proceed with the application or to comply with a direction by the Tribunal. In *Teelow v Page*, Member Sosso outlined some of the factors which the Tribunal will take into account in determining whether to exercise the discretion vested in it by s 148(b). In particular, I repeat and adopt the following (at [17]):

> The power in s 148 is discretionary. The implications of its exercise are severe. It is a power that should be used sparingly and only in cases where it is manifestly clear that it is appropriate to do so.

[11] It seems to me that, absent a 'springing' or 'guillotine' order, it would only be in the most exceptional circumstances that a delay of one day in complying with a direction, which triggered the State's application for dismissal, would warrant the exercise of the statutory dismissal discretion. In any event, the native title party's contentions and accompanying evidence were provided to the Tribunal under cover of letter dated 6 August 2013 and received in the Registry on 7 August 2013. The Government party withdrew its request for dismissal pursuant to s 148(b) on 7 August 2013.

[12] On 20 August 2013, directions were amended in response to a request from the grantee party to allow additional time for its response to the native title party, and the Government party's date for its response was also extended accordingly. By 21 August 2013, all parties had provided their contentions and supporting documents.

[13] On 9 September 2013, I sought the view of each party as to whether the matter should be dealt with on the papers or by way of an oral hearing. By 10 September 2013, all parties had informed the Tribunal that they did not intend to provide any further submissions and that the matter could be determined on the papers according to s 151(2) of the Act. Having considered the material provided to the Tribunal, I am satisfied that it is appropriate to determine the matter in this way.

Legal principles

[14] 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.

[15] In relation to s 237 generally, the applicable legal principles are set out by Deputy President Sumner in *Walley v Western Australia* at [7] – [11] and are adopted for the purpose of this determination. In summary, they are as follows:

(a) in respect of all three limbs of s 237, the Tribunal is required to make a predictive assessment and look at what is likely to occur (*Walley v Western Australia* at [8], citing French J in *Smith v Western Australia* at [23]; endorsed by Nicholson J in *Little v Western Australia* at [68]-[72]);

(b) the adoption of a predictive assessment approach means that evidence of a grantee party's intentions, including as to protection of sites of particular significance, may be relevant but the weight to be given to such evidence will depend on the circumstances of the case. In the absence of evidence of the grantee party's intentions, the question of likelihood must be assessed by reference to the applicable regulatory regime on the basis that the rights given will be exercised to the full (*Walley v Western Australia* at [9], referring, *inter alia*, to *Western Australia v Smith* at [35]; *Silver v Northern Territory* at [25]-[32] and [122]);

(c) no party bears an onus of proof and the Tribunal is required to adopt the commonsense approach to the receipt of evidence explained by Carr J in *Ward v Western Australia* at 215-218 (*Walley v Western Australia* at [10]); and

(d) unless there is evidence to the contrary, the Tribunal will act on the basis that the Government will exercise its powers, including making discretionary decisions properly and in accordance with the law; and that a grantee party

will not act contrary to the law and the regulatory regime, including conditions imposed, which governs the exercise of rights under the grant (*Walley v Western Australia* at [11], referring to: *Western Australia v Smith* at [37]; *Ward v Western Australia* at 228 and 230; *Little v Western Australia* at [76]-[77]).

[16] In *Silver v Northern Territory*, Deputy President Sosso usefully summarised the history of s 237(a) at [49]-[62], with which Deputy President Sumner agreed in *Walley v Western Australia* at [13]-[21], and set out in *Tullock v Western Australia* at [64]. In summary, the approach is as follows:

(a) the focus is on 'community and social activities' which are essentially physical activities, even if they are carried out because of the spiritual relationship that a native title party has to the land (see also Deputy President Sumner's explanation of this point in *Tullock v Western Australia* at [66]);

(b) the term 'community' is contextual and '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 needs to be provided to identify the individuals as a community (*Silver v Northern Territory* at [59], drawing on comments from Deputy President Sumner in *Re Cheinmora* at 227 and Brennan J in *Mabo v Queensland (No 2)* at 61);

(c) the term 'social activities' is focussed towards activities of the native title group, though it can encompass activities carried out by an individual or small group in certain circumstances, such as where the activity is relevant beyond the person involved (*Silver v Northern Territory* at [60]); and

(d) the level of interference with community and social activities must be substantial rather than trivial (*Silver v Northern Territory* at [57]; see also *Ashwin v Kubwa Iron Ore Holdings* at [38] which outlines the need for specific evidence of the substantial impact).

[17] As Deputy President Sosso explained in *Silver v Northern Territory* (at [88]), s 237(b) focuses the inquiry towards areas or sites of particular significance, in accordance with their

traditions, to the persons who are the holders of native title. The applicable principles discussed in *Silver v Northern Territory* (at [88]-[92], [101]-[102]) are as follows:

(a) the area or site must be of special or more than ordinary significance to the native title holders (applying Carr J's explanation in *Cheinmora v Striker Resources* at 34). In this regard I note it is well established that a site or area may be of particular significance without being recorded on the Government's cultural heritage register (see *Little v Lake Moore Gypsum* at [67]);

(b) if an area or site is of particular significance, it must be known and must able to be located and the nature of its significance explained to the Tribunal (referring to *Western Australia v McHenry*);

(c) even slight interference to a relevant area or site may be unacceptable in the context of s 237(b) but the interference must involve actual physical intervention;

(d) generally the relevant area or site will be located within the proposed licence, in order for it to be directly affected by grant. It is possible for an area or site of particular significance located outside the proposed licence to be taken into consideration where evidence is adduced demonstrating how the relevant activities under the grant would directly and physically affect the relevant site, and that the activities off-site are, in fact, an integral part of the activities on-site. Examples given in *Silver v Northern Territory* at [89] are 'construction of roads, truck movements to and from the proposed licence etc'; and

(e) there must be a real chance or risk of interference with the area or site (referring to *Smith v Western Australia* and *Little v Western Australia*, adopting the "real risk" approach).

[18] As explained in *Parker v Ammon* at [35], whilst the Tribunal is entitled to have regard, and give considerable weight, to the Government party's site protection regime (relevantly in this matter, the provisions of the *Aboriginal Heritage Act 1972* (WA) ('AHA')), this does not mean that in all cases the protective regime will be adequate to make interference unlikely under s 237(b). This approach was approved by Siopis J in *Parker v Western Australia* at [18].

[19] The task of the Tribunal in relation to s 237(c) of the Act is to undertake a predictive assessment as to whether there is a real chance or risk of major disturbance to land and waters. The relevant disturbance is understood to be a significant, direct physical disturbance to the land or waters concerned: *Cosmos v Croydon Gold* at [29]; *Lungunan v Geotech International* at [50].

[20] In *Little v Oriole Resources No 2*, the Full Court of the Federal Court considered the construction of s 237(c) of the Act at [41]-[57]. As explained at [41], the condition created by s 237(c) is different in form from those set out in ss 237(a) and (b) in that it requires consideration not only of the relevant future act but also of the effect of the rights created by it. This brings into play a two-step approach in circumstances where there are rights which are not created by the future act itself, but which come into existence as a consequence of things done under the act. For example, a particular future act may empower a person to make decisions or elections or to do things post grant, upon which certain rights subsequently come into existence (*Little v Oriole Resources No 2* at [44]). In those circumstances, the Tribunal must undertake a predictive assessment in respect of the effect of rights created by the grant of the proposed licence, and also in respect of the effect of rights (if any) which may come into existence upon some post-grant contingency.

[21] Following *Little v Oriole Resources No 2*, the approach to s 237(c) is as follows:

(a) section 237(c) requires a consideration of the effect of the relevant future act and also consideration of the effect of any rights created by the future act (*Little v Oriole Resources No 2* at [41]);

(b) the assessment, in respect of both granted and contingent rights, is in relation to what is likely to be done, rather than what could be done (*Little v Oriole Resources No 2* at [51]);

(c) the term ‘major disturbance’ is to be given its ordinary English 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 (*Little v Oriole Resources No 2* at [52]-[54], referring to *Dann v Western Australia* at 395, 401 and 413); and

(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 (*Oriole Resources* at [39] referring to Nicholson J in *Little v Oriole Resources* at [44]), the characteristics of the relevant land and waters, as well as the remedial regulatory regime in place (*Freddie v Western Australia* at [70]).

Native title rights and interests

[22] The native title party's native title rights and interests, as appear on the National Native Title Register in relation to the Yindjibarndi portion of the determination area, are relevantly as follows:

> ....
>
> 4. The native title rights and interests:
>
> (a) do not confer possession, occupation, use and enjoyment of land or waters on the native title holders to the exclusion of others; and
>
> (b) are not exercisable otherwise than in accordance with and subject to traditional laws and customs for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).
>
> 5. [not relevant]
>
> 6. [not relevant]
>
> 7. Subject to paragraphs 4 and 8 to 15 inclusive, the Yindjibarndi People have the following non-exclusive native title rights and interests in relation to the Yindjibarndi Native Title Area:
>
> (a) A right to access (including to enter, to travel over and remain);
>
> (b) A right to engage in ritual and ceremony (including to carry out and participate in initiation practices);
>
> (c) A right to camp and to build shelters (including boughsheds, mias and humpies) and to live temporarily thereon as part of camping or for the purpose of building a shelter; (varied 27 August 2007)
>
> (d) A right to fish from the waters; (varied 27 August 2007)
>
> (e) A right to collect and forage for bush medicine; (varied 27 August 2007)
>
> (f) A right to hunt and forage for and take fauna (including fish, shell fish, crab, oysters, goanna, kangaroo, emu, turkey, echidna, porcupine, witchetty grub and swan but not including dugong or sea turtle); (varied 27 August 2007)
>
> (g) A right to forage for and take flora (including timber logs, branches, bark and leaves, gum, wax, Aboriginal tobacco, fruit, peas, pods, melons, bush cucumber, seeds, nuts, grasses, potatoes, wild onion and honey); (varied 27 August 2007)

(h) A right to take black, yellow, white and red ochre; (varied 27 August 2007)

(i) A right to take water for drinking and domestic use;

(j) A right to cook on the land including light a fire for this purpose; (varied 27 August 2007)

(k) A right to protect and care for sites and objects of significance in the Yindjibarndi Native Title Area (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others so as to perpetuate the benefits of the area and warn against behaviour which may result in harm, but not including a right to control access or use of the land by others).

8. [not relevant]

9. [not relevant]

10. [not relevant]

11. The non-exclusive native title rights and interests in relation to the 'Telstra Area' (defined in the First Schedule - see Attachment 1) do not include:

(a) a right to remain (part of right (a) in paragraphs 6 and 7 above); and

(b) right (c) in paragraphs 6 and 7 above.

12. The non-exclusive native title rights and interests in relation to the 'Telstra Cable Routes' (defined in the First Schedule - see Attachment 1) do not include right (h) in paragraphs 6 and 7 above, to the extent that the right involves digging beneath the surface of that land.

Qualifications

13. Notwithstanding anything in this determination, there are no native title rights and interests in or in relation to:

(a) minerals (including ochres to the extent they are minerals) as defined in the Mining Act 1904 (WA), or in the Mining Act 1978 (WA) before the date of this determination; or

(b) petroleum as defined in the Petroleum Act 1936 (WA), or in the Petroleum Act 1967 (WA) before the date of this determination.

14. There are no native title rights and interests in respect of 'Subterranean Waters' (as defined in the First Schedule - see Attachment 1) in the Determination Area.

15. The non-exclusive native title rights and interests are subject to and exercisable in accordance with the laws of the State and the Commonwealth including the common law.

Other interests

16. The nature and extent of other interests in those parts of the Determination Area where native title exists are set out in the Second Schedule (see Attachment 4).

17. The relationship between the non-exclusive native title rights and interests and the other interests referred to in paragraph 16 is that:

(a) to the extent that any other interest is a category D past act, a category D intermediate period act or a future act under the Native Title Act 1993 (Cth), or is

> an act to which sections 47A or 47B Native Title Act 1993 (Cth) applies, and is inconsistent with the continued existence, enjoyment or exercise of the native title rights or interests, the native title continues to exist in its entirety, but the native title rights and interests have no effect in relation to the other interests to the extent of the inconsistency during the currency of those other interests;
>
> (b) in the case of mining leases, pastoral leases, easements and licences granted prior to 1 January 1994, the construction or erection of an improvement required or permitted under such a lease or easement or licence will prevent the exercise of the non-exclusive native title rights and interests at the location of that improvement to the extent that the exercise of those rights are inconsistent with the improvement for so long as the holder of the lease, easement or licence retains the improvement; and
>
> (c) otherwise, the existence and exercise of the native title rights and interests does not prevent the doing of any activity required or permitted to be done by or under the other interests, and the other interests, and the doing of any activity required or permitted to be done by or under the other interests, prevail over the native title rights and interests and may prevent any exercise of the native title rights and interests, but does not extinguish them.

Government party contentions and evidence

[23] The Government party provided the following material to the Tribunal:

(a) Documents provided on 26 July 2013, as follows:

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

ii. A report and plan from the Register of Aboriginal Sites ('Register') maintained by the Department of Indigenous Affairs ('DIA', now the Department of Aboriginal Affairs ('DAA'));

iii. A copy of the tenement application signed 6 April 2004 and date stamped 8 April 2004 by the Mining Registrar, Karratha, together with a Draft Tenement Endorsements and Conditions Extract;

iv. An instrument of tenement and the first schedule listing land included and excluded from the grant; and

v. A Tengraph Quick Appraisal detailing the land tenure, current and historical mining tenements, native title areas, and relevant services,

Aboriginal communities and other features within the proposed licence.

(b) A statement of contentions dated 19 August 2013, together with:

i. Annexure 1 – Map of the proposed licence;

ii. Annexure 2 - Tengraph Quick Appraisal Form for the proposed licence plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities;

iii. Annexure 3 – DIA Aboriginal Heritage Inquiry System Results for the proposed licence;

iv. Annexure 4 –Document entitled Application for Exploration Licence, Section 58(1)(b) Statement referring to Fortescue Metals Group and date stamped 8 April 2004, Mining Registrar, Karratha;

v. Annexure 5 – Draft Tenement Endorsements and Conditions Extract for E47/1397; and

vi. Annexure 6 - Statutory declaration of Ms Gemma Philips on behalf of the grantee party, regarding a Regional Standard Heritage Agreement ('RSHA') dated 6 August 2012.

[24] The Tengraph Quick Appraisal establishes the underlying land tenure within the proposed licence consists of: pastoral leases (Coolawanyah PL 3114/1228 covering 30.8 percent and Mt Florance PL 3114/465 covering 55.8 percent); historical pastoral leases (H 394/664 covering 29.8 percent and H 394/432 covering 55.8 percent); and vacant crown land covering 13.4 percent. It also shows tenement L 47/673 covering 11.1 percent as an affected tenement, though its status is pending, and the various services to be affected, consisting of: 34 tracks serviced; 2 buildings symbolised; 2 fence lines; 4 yards symbolized; 1 yard to scale; 1 tank; 1 well/bore; and nine well/bores with windmill.

[25] According to the Tengraph Quick Appraisal, past exploration activities over the proposed licence comprise two exploration permits (E47/503 and E47/555 surrendered in 1995 and 1994 respectively) and six TR tenements (the last of which was cancelled in 1980).

[26] The report from the DIA Register indicates there are no registered Aboriginal sites within the proposed licence and also that there are no 'other heritage places'. The Tribunal mapping confirms this, though I note there are three sites to the north-east of the proposed licence, within approximately seven kilometres, and a cluster of several sites approximately 15 kilometres north of the proposed licence.

[27] Both the Government party's contentions and Tribunal mapping indicate there are no Aboriginal communities (in the sense of a geographically localised group of persons) within the proposed licence area. I note, however, that 'community' when used in s 237(a) of the Act is not necessarily limited to a particular residential or localised community (see *Silver v Northern Territory* at [59]), but the fact that there is no such community in the vicinity of the proposed licence may be relevant to the Tribunal's inquiry in a particular case (see *Cherel v Faustus Nominees* at [33]).

[28] The initial grant term of five years is renewable pursuant to s 61(2) of the *Mining Act* 1978 (WA) ('*Mining Act'*). The rights which will be conferred by the proposed licence are set out in s 66 of the *Mining Act*. The Government party intends to impose the endorsements and conditions set out in the Draft Tenement Endorsement and Conditions Extract, as follows:

> **ENDORSEMENTS**
>
> 1. The Licencee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
>
> 2. The Licencee's attention is drawn to the provisions of 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.
>
> 3. 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.
>
> 4. The grant of this licence does not include the land the subject of prior Exploration Licence 47/585. If the prior licence expires, is surrendered or forfeited that land may be included in this licence, subject to the provisions of the Third Schedule of the Mining Regulations 1981 titled "Transitional provisions relating to Geocentric Datum of Australia".
>
> **In respect to Water Resource Management Areas (WRMA) the following endorsements apply:**
>
> 5. The licencee [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

6. 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.

7. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being 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:

8. 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:

9. Advise shall be sought from the DoW if proposing any exploration with 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 Surface Water and Irrigation District Areas the following endorsements apply:

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

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

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

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

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

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

CONDITIONS

1. 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.

[29] The proposed method of exploration is set out in a 'Section 58(1)(b) Statement' which accompanied the application received by the Mining Registrar on 8 April 2004 (see [23(b)(iv)] above). The technical and financial resources available to the grantee party are shown as being those of Fortescue Metals Group. The proposed method of exploration indicates that the initial activities to be carried out in the area of the proposed licence include: the acquisition of aerial photography; landsat imagery, aeromagnetic and other public geophysical data sets to be ortho-rectified and imported into a data management system; geological mapping (including rock chipping sampling, target selection, gridding and access); ranking and selection of targets supporting strategy direction; and ethnographic clearance. After these initial activities have been completed, the next activities which may be carried out include: infill drilling of previously drilled targets; analysis of samples; compilation of data; and metallurgical testing of low-grade or marginal material.

[30] Following the decision of the Full Court of the Federal Court in *Oriole Resources*, the Tribunal is required to undertake the exercise required by s 237 by reference to what activities are likely to be done, and not what activities could have been done pursuant to the proposed grant. In *Oriole Resources*, there was evidence as to what was proposed to be done

on the land, or more precisely, evidence that particular activities, which would be authorised by the grant, would not be done. In those circumstances, the Full Court held that the predictive assessment should have taken into account the evidence of a limitation on the proposed works, so that to approach the task on the basis of an extensive exercise of what could have been done under the tenement was to fall into error. In this matter, there is no current evidence of the grantee party's intended exercise of all of the rights created by the grant. Given that some nine years have elapsed since the tenement application was made, it seems to me that the weight to be given to the proposals set out in the 2004 s 58(1)(b) statement should be tempered by the present evidence of the grantee party which places some emphasis on: Fortescue Metals Group Limited Ground Disturbance Permit Procedure (Weaver affidavit at paragraph 9); its policy not to undertake ground disturbing activities without a heritage survey having first been undertaken (Weaver affidavit at paragraph 17); and the anticipation that it would undertake heritage surveys with the Yindjibarndi People in the relevant area prior to undertaking ground disturbing work. In my view, this leaves open the inference that the exploration activities now proposed may be more extensive than those listed in the s 58(1)(b) notice.

[31] The statutory declaration of Tenement Officer, Ms Gemma Philips (as agent for the grantee party) made on 6 August 2012 and attached to the Government party's contentions, indicates the grantee party has offered to enter into an RSHA with the 'Yindjibarndi claimants', and the grantee party executed it and sent it to the Yindjibarndi Aboriginal Corporation ('YAC') on 2 August 2012. There is no evidence as to whether or not the native title party received, or responded to, the proposed RSHA. However, the native title party in its contentions (at paragraph 83) states:

> The Native Title Party has never endorsed the RSHA; it does not accept it as an adequate or appropriate means of dealing with issues under s 237 of the NTA.

[32] I agree with Deputy President Sumner in *Champion v Western Australia* (at [29]-[35]) that whilst the Tribunal, undertaking its predictive assessment, can have regard to the attitude of a grantee party to entering into a RSHA and other evidence directed towards the protection of Aboriginal heritage, the weight to be given to those matters will depend on the overall circumstances. In particular, I repeat and adopt what was said in *Champion v Western Australia* at [32]):

> For a grantee party, compliance with the Government party's requirements gets them through the gate into the expedited procedure, but if there is an objection

> from a native title party who does not accept the RSHA then the grantee party will need to give consideration as to what it is prepared to do to resolve heritage concerns of that party if in fact areas or site of particular significance to them exist in the area. Executing a RSHA in relation to them after the objection is lodged or (as in this case) expressing a preparedness to do so will be a relevant factor that the tribunal can have regard to as some evidence of the grantee party's intention with respect to the protection of sites.

[33] However, given that native title has been determined in the relevant area of the proposed licence since 2005, and the relevant party with which to reach agreement is the registered native title body corporate (the native title party) and not the registered native title claimants, it is not at all clear that the offer of the grantee party to enter into the RSHA with the 'Yindjibarndi claimants' was in respect of the area covered by the present inquiry. Given that the offer was made some 8 years after the determination of native title and was directed to the Yindjibarndi claimants, the inference is open that the offer may have been in respect of the area of the Yindjibarndi #1 claim. I note that Mr Weaver, in his affidavit, refers to FMG welcoming 'the opportunity to enter into the Regional Standard Heritage Agreement with the Native Title Party' (at paragraph 15), but does not go on to say that an offer to do so has been made in respect of the proposed licence area. In Mr Weaver's affidavit, the reference to 'FMG' is to Fortescue Metals Group and its wholly owned subsidiaries (one of which is the grantee party).

Native title party contentions and evidence

[34] The Tribunal received the following material from the native title party:

(a) Statement of contentions dated 6 August 2013 (received on 7 August) with the following five annexures;

i. a copy of a letter dated 21 December 2012 to the Tribunal regarding the objection lodged on behalf of Yindjibarndi #1;

ii. a copy of a letter dated 14 January 2013 to Ms Araujo, legal representative for the native title party, advising of the non-acceptance decision in respect of the objection lodged by Yindjibarndi #1;

iii. a Submission by the DIA to the Functional Review Committee established to review the DIA (June 2006);

iv. a copy of a letter dated 5 November 2011 from Ms Singleton, an archaeologist of Eureka, to the DIA regarding heritage survey reports in the Firetail and Solomon Project area conducted for Fortescue Metals Group Limited; and

v. a map showing the Ngarluma/Yindjibarndi determination area.

(b) Affidavit of Mr Woodley, Chief Executive Officer of the native title party's body corporate and a member of the Yindjibarndi People, which was affirmed 6 August 2013, and refers to the following annexures:

i. MW 1 – affidavit of Mr Ned Cheedy sworn 7 April 2013;

ii. MW 2 – Contract for Services in Relation to Exploration [Heritage Agreement] (date unclear) between Fortescue Metals Group Limited and Yindjibarndi #1 Native Title Applicants (signed on behalf of both parties); letter dated 2 July 2007 from FMG to Mr Michael Woodley, Juluwarlu Aboriginal Corporation; Contract for Services in Relation to Exploration [Heritage Agreement] dated 29 June 2007 between Fortescue Metals Group Limited and Yindjibarndi #1 Native Title Applicants (signed on behalf of Fortescue Metals Group Limited) [referred to in paragraph [11] of Mr Woodley's affidavit as MW 2A];

iii. MW 3 – letter dated 22 August 2007 from FMG to the Yindjibarndi People (C/- Juluwarlu Aboriginal Corporation) advising of regret regarding the impact to a natural spring caused from ground clearing activities conducted by Fortescue Metals Group Limited;

iv. MW 4 – agreement between Fortescue Metals Group Limited and Yindjibarndi Council reflecting discussions held on 16 August 2007;

v. MW 5 – appointment of the Yindjibarndi Aboriginal Corporation to act as the agent of the applicant in the Yindjibarndi #1 native title determination application and related matters, dated 25 March 2013;

vi. MW 6 – letter dated 27 May 2013 from Mr Irving, Yindjibarndi Aboriginal Corporation RNTBC's Legal Counsel, to Fortescue Metals Group Limited advising of the notice of change in name, contact details and address for

service of agent pursuant to s 84B(1) of the *Native Title Act* 1993 (Cth), filed with the Federal Court of Australia on 2 April 2004 and directing that all correspondence concerning Yindjibarndi #1 claim should be directed to Yindjibarndi Aboriginal Corporation RNTBC. The following items accompanied this letter: the notice filed in the Federal Court; a letter to the grantee party advising of the section 66B orders (made by the Honourable Justice McKerracher on 15 February 2013 directing the existing applicant for Yindjibarndi #1 native title determination application be replaced) and notifying that all correspondence for Yindjibarndi #1 should be sent to Yindjibarndi Aboriginal Corporation RNTBC as its Directors have consented to acting as agent for the Yindjibarndi #1 claim; a map outlining the boundaries of the Ngarluma/Yindjibarndi determination, Yindjibarndi #1 and displaying major towns and settlements and current and pending mineral tenements as of May 2013;

vii. MW 7 (but marked MW 6) – a map indicating the grantee party's live and pending tenements in Yindjibarndi country as at May 2013;

viii. MW 8 – a map depicting the approximate location of some of the sites said to be affected by the proposed licence;

ix. MW 9 (but marked MW 13) - Minutes of the meeting of the Aboriginal Cultural Material Committee ('ACMC'), held on 1 June 2011;

x. MW 10 – Minutes of the Ordinary Meeting of the ACMC held on 9 November 2011;

xi. MW 11 (but marked MW 15) – a copy of a document entitled 'FMG s18 application – Assessment of 17 Heritage Places' referred to in paragraph 124 of Mr Woodley's affidavit as the 'DIA Report on the Assessment of 17 Heritage Places';

xii. MW 12 (but marked MW 16) – submissions of Yindjibarndi Aboriginal Corporation RNTBC in respect of an Inquiry under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), regarding

Ganyjingarringunha Wundu (Kangeenarina Creek) by way of letter dated 15 October 2012;

xiii. MW 13 (but marked MW 17) – a copy of various ABC News reports variously headed 'Miner admits indigenous sites were damaged' (published 12 September 2012, referring to Fortescue Metals Group (FMG)), 'FMG rejects claims sacred sites damaged' (published November 2011) and 'FMG admits destroying sacred sites at Solomon Hub (published September 2012); and a WA Today report entitled 'No legal action for FMG over sacred site destruction' (published 12 September 2012); and

xiv. MW 14 (but marked MW 18) – letter dated 6 June 2013 from the Native Title Manager, Fortescue Metals Group Limited, to Yindjibarndi Aboriginal Corporation indicating it 'remains open to executing a heritage protection agreement which contemplates the involvement of YAC and Wirlu-Murra Yindjibarndi Aboriginal Corporation ('WMYAC') over Fortescue's [referring to Fortescue Metals Group Limited] granted and pending tenements on Yindjibarndi traditional lands'.

(c) Affidavit of Mr Kyriakos Savas, company director, and the former solicitor at the firm representing WMYAC in respect of proposed grants to FMG Pilbara Pty Ltd and in respect of the dealings of WMYAC with Fortescue Metals Group Pty Ltd between August 2010 and January 2012 (referring to both the grantee party and Fortescue Metals Group Pty Ltd as 'FMG'). The affidavit was sworn on 8 July 2013 and has the following annexures:

i. KS 1 – list of 'attendees' at a meeting on 28 August 2010 near Dampier between legal representatives and a group of Yindjibarndi people (paragraph 9 of Mr Savas' affidavit refers to a handwritten list, but the annexed document is typed);

ii. KS 2 – minutes of meeting held 28 August 2010 near Dampier;

iii. KS 3 – a copy of the Tribunal's future act determination handed down 17 June 2011: *FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia* [2011] NNTTA 107;

iv. KS 4 – a copy of an article published in the National Indigenous Times on 31 October 2012 entitled 'Mining deal bombshell: Whistleblower reveals Fortescue's backing for Wirlu-Murra to undermine Yindjibarndi stand';

v. KS 5 – a copy of an article published in the National Indigenous Times on 28 November 2012 entitled 'Rival Pilbara T.O. groups risk $100m to unite and say: Hit the road Twiggy';

vi. KS 6 – letter dated 24 December 2012 to Yindjibarndi Aboriginal Corporation RNTBC with a copy of WMYAC Submissions in response to application by Yindjibarndi Aboriginal Corporation pursuant to section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth);

vii. KS 7 – various documents as follows: Minutes of WMYAC Board meetings held on 14 June 2012, 7 August 2012 and 24 October 2012 in Roebourne; various email exchanges between RCD Consulting and Mr Bruce Thomas, and between Mr Bruce Thomas and Mr Michael Gallagher;

viii. KS 8 – letter dated 18 January 2013 from Mr Bruce Woodley, Chairman of WMYAC, to the Office of the Registrar of Indigenous Corporations ('ORIC') with the Australian Securities and Investments Commission ('ASIC') records attached;

ix. KS 9 – letter dated 24 January 2013 from Mr Bruce Woodley, Chairman of WMYAC to the ASIC; and

x. KS 10 – letter dated 31 January 2013 from Mr Bruce Woodley, Chairman of WMYAC to Mr Stanley Warrie, Chairman of Yindjibarndi Aboriginal Corporation with attached 'Report of an Ethnographic Consultation to comment on Sixteen Archaeological sites in Firetail West, Central and Rail Loop areas in Fortescue's Solomon Project' dated September 2011.

(d) Affidavit of Mr Stanley Warrie, Director of the Yindjibarndi Aboriginal Corporation RNTBC sworn 9 July 2013 in support of Michael Woodley as the 'right man to give evidence about Yindjibarndi Country'.

(e) Affidavit of Ms Rosie Cheedy, Yindjibarndi person, sworn 9 July 2013 with attachment RC 1 being letter dated 24 August 2012 from Yindjibarndi Women in support of Michael Woodley.

(f) Affidavit of Mr Angus Mack, Heritage Officer and Yindjibarndi person, sworn 9 July 2013 in support of Michael Woodley. Accompanying his affidavit are the following annexures:

(i) AM 1 – a copy of the affidavit of Ned Cheedy sworn 7 April 2011;

(ii) AM 2 – a copy of The Juluwarlu Newsletter published in June 2006, which describes the relationship between Juluwarlu, the Yindjibarndi Aboriginal Corporation and the Yindjibarndi People; and

(iii) AM 3 – a letter dated 23 August 2012 from Yindjibarndi Aboriginal Corporation RNTBC which supports Mr Woodley's authority to give evidence on behalf of the Yindjibarndi Aboriginal Corporation.

(g) Affidavit of Mr Peter Davies, the Administration Manager and Anthropologist of Juluwarlu Group Aboriginal Corporation, sworn 10 July 2013. Accompanying the affidavit are the following annexures:

i. PD 1 – a copy of a flyer prepared by Fortescue Metals Group Limited entitled 'Yindjibarndi-Fortescue Information Paper' detailing negotiations between the parties in relation to the Solomon project and the outcome of a decision on whether the grantee party had negotiated in good faith;

ii. PD 2 – copies of a series of emails sent between 1 September and 2 December 2005, apparently between senior officers of Fortescue Metals Group Limited and its legal representative in native title matters;

iii. PD 3 – a document entitled 'Tribunal and Court Actions between FMG and YAC' listing various determinations and decisions, including determinations of the Tribunal;

iv. PD 4 – letter dated 31 March 2011 from the legal representative of WMYAC to the legal representative of the Yindjibarndi #1 native title claimants with a

copy of a document entitled 'FMG – Yindjibarndi People Land Access Agreement', the parties being Yindjibarndi People, Yindjibarndi Aboriginal Corporation and the Fortescue Metals Group Ltd, FMG Pilbara Pty Ltd and Pilbara Infrastructure Pty Ltd, signed by three of the Yindjibarndi #1 Applicants;

v. PD 5 – a copy of a letter dated 2 July 2007 from the Fortescue Metals Group Limited's legal adviser to Mr Michael Woodley, Juluwarlu Aboriginal Corporation with a copy of a Contract for Services in Relation to Exploration (Yindjibarndi/FMG Heritage Agreement for Exploration Tenements E47/1448, E47/1333 & E47/1334) dated 29 June 2007 between Yindjibarndi #1 Native Title Applicants and Fortescue Metals Group Ltd, executed by Fortescue Metals Group Ltd;

vi. PD 6 – a copy of the *United Nations' Declaration of the Rights of Indigenous Peoples* adopted on 13 September 2007;

vii. PD 7 – copies of letters dated 1 June 2010 and 14 July 2010 from Mr George Irving, of Counsel, for and on behalf of the Yindjibarndi People to the then President of the Tribunal, Mr Graeme Neate;

viii. PD 8 – a copy of an agreement entitled 'FMG Land Access Agreement' (final execution version) dated 10 October 2005 between Fortescue Metals Group Ltd, Pilbara Infrastructure Pty Ltd, FMG Chichester Pty Ltd and the Palyku People and a (part) copy of agreement entitled 'FMG Land Access Agreement' (final execution version) dated 10 October 2005 between Fortescue Metals Group Ltd, Pilbara Infrastructure Pty Ltd, FMG Chichester Pty Ltd and the Nyiyaparli People;

ix. PD 9 – another copy of the letter dated 31 March 2011 and the document entitled 'FMG – Yindjibarndi People Land Access Agreement' provided above at PJD 4;

x. PD 10 – a copy of a notice entitled 'Notice of Meeting: Yindjibarndi #1 Native Title Claim Group Members Meeting' to be held 21 December 2010 in

Roebourne. A note in handwriting reads 'Pilbara News 8 December 2010 Pg 52';

xi. PD 11 – a copy of a letter dated 8 February 2012 from Mr Stanley Warrie, Chairman of the Yindjibarndi Aboriginal Corporation, to Messrs Corser & Corser headed 'Yindjibarndi Reconciliation', with attachments;

xii. PD 12 – a copy of an email dated 8 February 2012 from Mr Bower of Corser & Corser, Lawyers to 'Phil Davies' forwarded to George M Irving and copied to Michael Woodley and Frank Rijavec on the same day;

xiii. PD 13 – a copy of a letter dated 10 February 2012 from Integra Legal, to the Mr Stanley Warrie, Yindjibarndi Aboriginal Corporation;

xiv. PD 14 – Minutes of the Annual General Meeting of Yindjibarndi Aboriginal Corporation held 21 March 2012 in Roebourne;

xv. PD 15 – a list of all Yindjibarndi Aboriginal Corporation members present at the Annual General Meeting of 21 March 2012, with the names of those who are members of WMYAC highlighted;

xvi. PD 16 – a copy of an 'Agreement for the implementation, provision and maintenance of the Yindjibarndi Aboriginal Corporation's Native Title, Heritage, Environmental, Cultural, Administrative and Financial Services' management agreement between Yindjibarndi Aboriginal Corporation and Juluwarlu Group Aboriginal Corporation executed on 20 August 2008;

xvii. PD 17 – a copy of letter dated 2 March 2012 from Yindjibarndi Aboriginal Corporation to a representative of the Department of Sustainability, Water, Environment, Population and Communities, regarding an Application under ss 9, 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) made on 18 November 2011 (withdrawing the applications made under ss 9 and 12) with annexures (paragraph 8.6 of Mr Davies affidavit refers to PD 17 as being 'a copy of an application made on behalf of YAC, and YACs directors and CEO, for a declaration under section 10...' but no application is provided); and

xviii. PJD 18 – submissions of Yindjibarndi Aboriginal Corporation RNTBC (by way of letter dated 15 October 2012) regarding a report under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* – Michael Woodley and others - Yindjibarndi Aboriginal Corporation RNTBC.

(h) Affidavit of Dr Frank Rijavec, a Media and Communications Consultant employed by Juluwarlu Group Aboriginal Corporation, which was sworn on 11 July 2013. The affidavit was provided with the following annexures:

i. FR 1 – document entitled Archive Statement of Significance – Juluwarlu Aboriginal Corporation prepared by Jennifer Ford, archivist;

ii. FR 2 – a copy of Juluwarlu Aboriginal Corporation's template Standard Personal Release document;

iii. FR 3 – a copy of a letter dated 21 September 2011 from the Heritage Manager at Fortescue Metals Group Ltd to the Registrar of Indigenous Affairs;

iv. FR 4 – a copy of a letter dated 7 December 2010 from Corser & Corser Lawyers to the Registrar of the Aboriginal Cultural Material Committee regarding notice under s 18 of the AHA in respect of The Pilbara Infrastructure Pty Ltd's application for use of land the subject of the Yindjibarndi #1 claim;

v. FR 5 - letter dated 20 September 2011 from the DIA to the Heritage Manager at Fortescue Metals Group Ltd regarding consultation with Yindjibarndi Aboriginal Corporation and WMYAC;

vi. FR 6 – newsletter published in June 2007 by Fortescue Metals Group Ltd;

vii. FR 7 – a copy of a letter dated 7 February 2012 from Fortescue Metals Group Ltd to Yindjibarndi Aboriginal Corporation RNTBC, copying in WMYAC;

viii. FR 8 – a copy of a letter dated 23 May 2013 from 7 members of WMYAC to its Board of Directors;

ix. FR 9 – a copy of the transcript of proceedings from the WMYAC Annual General Meeting held in Roebourne on 27 May 2013;

x. FR 10 – a copy of the PowerPoint slides shown at the WMYAC Annual General Meeting held in Roebourne on 27 May 2013; and

xi. FR 11 – a copy of the Projects page from WMYAC's website indicating future intentions of Fortescue Metals Group Ltd and WMYAC in relation to Yindjibarndi #1.

(i) Affidavit of Mr Thomas Jacob, Chairperson of Yindjibarndi Aboriginal Corporation RNTBC, sworn 12 July 2013. Accompanying Mr Jacob's affidavit are the following annexures:

i. TJ 1 – a copy of Mr Ned Cheedy's affidavit sworn 7 April 2011;

ii. TJ 2 – the Juluwarlu Newsletter published in June 2006;

iii. TJ 3 – a copy of his own earlier affidavit, sworn 20 January 2011 endorsing Mr Michael Woodley's authority to speak for Yindjibarndi country and culture and describing the significance of the *Gurdi* (pebble mound mouse) sites under *Birdarra* law; and

iv. TJ 4 – a copy of the letter dated 23 August 2012 from Yindjibarndi Aboriginal Corporation RNTBC asserting support for Mr Michael Woodley's authority to give evidence on behalf of the Yindjibarndi Aboriginal Corporation.

[35] Although the native title party's evidence, and the documents attached to and referred to in the contentions, total over 1000 pages, much of it is directed to matters which appear to have no, or limited, relevance to the s 237 criteria. The Tribunal is not assisted in its task by a seemingly 'scatter-gun' approach to the evidence, where large volumes of material are provided without an apparent focus on the task at hand. For example, it is futile to focus on the desire of the native title party to have the right to negotiate regime apply without providing cogent and directed evidence (and contentions) which address the s 237 criteria. These criteria are discussed at [14] to [21] above.

[36] Dr Rijavec's affidavit and annexures totalling over some 100 pages, contain some evidence of the activities of the Juluwarlu Group Aboriginal Corporation which may inform the Tribunal as to the community and social activities of the Yindjibarndi People. It is not possible, however, to discern from the material whether, and how, these activities relate to, or

have a nexus with, the proposed licence area and the s 237 criteria, nor how they will be affected by exploration activities likely to be done pursuant to the grant.

[37] Mr Davies' affidavit and annexures consume over 500 pages and again provide a history of Juluwarlu Group Aboriginal Corporation and its relationship with the native title party. He also provides information about Fortescue Metals Group and WMYAC. His affidavit refers generally to the 'proposed grant of exploration licences in Yindjibarndi country' to the grantee party. At paragraph 8.10 of his affidavit, Mr Davies states his concern that 'the grant of the current set of exploration licences, without recourse to the right to negotiate process, will simply allow FMG to continue along the same path it has followed over the past three years': see also Mr Woodley's affidavit at 28, with respect to the proposed licence. That concern appears to be directed at the 'consequences of FMG's "partnership" with WMYAC and WMTH [Wirlu-Murra Tableland Heritage Pty Ltd]'. As I have said above, evidence addressing concerns about bypassing the right to negotiate procedure would have been more helpful to the Tribunal if the evidence was focussed on the s 237 criteria as it relates to the proposed licence, rather than the relationship between the parent company of the grantee party and various other entities.

[38] In nearly 100 pages of affidavit and annexures, Mr Savas provides a history of his work in relation to Yindjibarndi people in various roles and largely contains his recollections of various discussions in relation to meetings, particularly with respect to WMYAC and division within the Yindjibarndi community. I have not been able to discern anything in the material directed to, or having sufficient nexus with, the current proposed licence, the proposed exploration activities and the s 237 criteria.

[39] Mr Mack's much shorter affidavit does little more than adopt the evidence of Mr Woodley and Dr Rijavec; it does not refer at all to the proposed licence or provide any further assistance, other than to attest to Mr Woodley's authority in respect of Yindjibarndi country and law. As to Mr Woodley's authority in that regard, the affidavits of Ms Cheedy and Mr Warrie provide similar support. I accept, from the material provided, that Mr Woodley is authorised to speak about Yindjibarndi country and law and for the native title party.

[40] I will traverse Mr Woodley's evidence in more detail in my consideration of the s 237 criteria.

Grantee party contentions and evidence

[41] On 21 August 2013, the Tribunal received the grantee party's contentions, together with the affidavit of Mr Thomas James Weaver, the Native Title Manager at Fortescue Metals Group Ltd, which was affirmed on 20 August 2013. The following documents accompanied the affidavit:

(i) Annexure TJW 1 – Ground Disturbance Permit Procedure produced by the grantee party on 5 August 2011;

(ii) Annexure TJW 2 – Guidelines for the Management of Aboriginal Cultural Heritage produced by the Fortescue Metals Group's Heritage Unit in July 2013; and

(iii) Annexure TJW 3 – letter dated 27 May 2013 from Yindjibarndi Aboriginal Corporation RNTBC to Fortescue Metals Group Limited referring to the Notice of Change in name, contact details or address for service of agent filed in the Federal Court on 2 April 2004, detailing that correspondence for Yindjibarndi #1 claim (WC2003/003; WAD6005/2003) is to be sent to the future act unit of Yindjibarndi Aboriginal Corporation RNTBC.

[42] The grantee party refers to 'the affected area' in its contentions, being the area of the proposed licence which is covered by the determination of native title relevant to the objection application.

[43] There is an issue between the native title party and the grantee party as to the relevance and/or weight to be given to any heritage agreements and arrangements entered into by the grantee party with Yindjibarndi People who are also members of WMYAC. The native title party's evidence refers to various agreements between Fortescue Metals Group Pty Ltd and other entities. The native title party's position is that any such agreements should be given no weight as only the native title party has the 'authority to negotiate and enter into any such arrangements'. The grantee party disputes that contention and says that any heritage agreements and arrangements between Yindjibarndi People and the grantee party are relevant to the Tribunal's predictive assessment, relying upon Mr Weaver's affidavit in respect of those matters. However, apart from the Government party's reliance upon the statutory declaration of Ms Gemma Philips (as an agent for the grantee party) made on 6

August 2012 that the grantee party has offered to enter into a RSHA with the 'Yindjibarndi claimants', there is no evidence of executed heritage or other agreements between the grantee party (FMG Pilbara Pty Ltd) specifically and Yindjibarndi People in respect of the proposed licence. I have already commented above (at [33]) about the uncertainty as to whether the offer to enter into the RSHA Ms Philips refers to was made to the native title party in respect of the present inquiry area.

[44] The evidence of Mr Weaver is that Fortescue Metals Group Pty Ltd and its wholly owned subsidiaries (which includes the grantee party) would 'welcome the opportunity to enter into the Regional Standard Heritage Agreement with the Native Title Party' (see [33] above) and that they regularly conduct Aboriginal heritage surveys with the participation of Yindjibarndi People in respect of the area of the Yindjibarndi #1 claim area. There is no evidence of surveys being conducted with Yindjibarndi People in respect of the affected area, whether by the wider 'FMG' group, or by the grantee party.

[45] In light of the evidence, the debate as to the relevance or weight to be given to any heritage arrangements or agreements between the grantee party and Yindjibarndi people may be a barren one. However, it does raise another issue which is live between the parties.

Identity of the grantee party

[46] At paragraph 5 of its Statement of Contentions dated 6 August 2013 ('NTP Contentions') the native title party addressed the identity of the 'grantee party' by indicating that its 'references to the conduct of the Grantee Party, includes the conduct of the Grantee Party's controlling entity, any wholly owned subsidiary of the Grantee Party or any 'related party' (as that term is defined in the *Corporations Act* 2006 (Cth))'.

[47] 'Grantee party' is defined in s 253 of the Act as having the meaning given in s 29(2)(c), which clearly identifies the 'grantee party' as the person who has 'requested or applied for' the doing of the relevant act.

[48] The native title party refers to the decision of McKerracher J in *NC (deceased) v Western Australia* in support of its submission that 'grantee party' should be given the expanded meaning for which it contends. Such reliance is misplaced.

[49] *NC (deceased) v Western Australia* involved applications by Fortescue Metals Group Pty Ltd, The Pilbara Infrastructure Pty Ltd and FMG Pilbara Pty Ltd (the grantee party in this expedited procedure objection application) to each become respondents to a native title determination application. The latter two companies were subsidiaries of Fortescue Metals Group Pty Ltd: see *NC (deceased) v Western Australia* at [6]. At the outset, his Honour indicated that he intended to refer to the three companies collectively as FMG, except where necessary to refer to a specific company: see (*NC (deceased) v Western Australia* at [1].

[50] Even though FMG (collectively) was pursuing a mining development within the claim area, in *NC (deceased) v Western Australia* at [6], McKerracher J considered each company separately in respect of its joinder application and the interests relied on to support its application. Relevantly, FMG Pilbara Pty Ltd was identified as holding 14 mining tenements, and as the applicant for over 20 more mining tenements, falling wholly or partly within the claim area: see *NC (deceased) v Western Australia* at [8]. As is made clear in *NC (deceased) v Western Australia* at [24]-[25], those interests (and not those of the 'collective' group), formed the basis for FMG Pilbara Pty Ltd being joined as a respondent. The approach taken in that case is not consistent with the contention of the native title party that 'the Grantee Party cannot and should not be separated from its controlling entity, Fortescue Metals Group Limited, or any wholly owned subsidiary, or related party of the Grantee Party' (NTP Contentions, at paragraph 5).

[51] The starting point then is that the grantee party in this expedited procedure objection application is FMG Pilbara Pty Ltd. Subject to any inferences to the contrary that can be drawn from the evidence, it is the conduct and intentions of that body which are relevant to the Tribunal's inquiry. However, on the evidence in this case, it is clear that the conduct and intentions of the grantee party cannot be distinguished from those of its parent company, Fortescue Metals Group Limited and its other subsidiaries. So much can be inferred in this case, particularly from the evidence of Mr Weaver who, as the Native Title Manager for the grantee party's controlling entity, is authorised to give evidence in support of the grantee party and then refers to the actions and intentions of Fortescue Metals Group Limited and its wholly owned subsidiaries in support of the application for the proposed licence. Indeed, when the application for an exploration tenement was made in 2004, the accompanying s 58(1)(b) statement set out the proposed method of exploration by reference to the resources of the 'Fortescue Metals Group', not the grantee party.

[52] In light of those evidentiary matters, I agree with the native title party's submission that the conduct and actions of the grantee party's controlling entity, Fortescue Metals Group Limited, and of its other wholly owned subsidiaries, are relevant to the Tribunal's consideration in this matter.

Relevance of the Yindjibarndi #1 claim

[53] The native title party contends that the Tribunal should take into account its submissions and evidence relating to the area of the proposed licence that overlaps the area of the Yindjibarndi #1 People native title claim on the basis that 'the entire area of the Proposed Tenement is within the spiritual and cultural domain of the Yindjibarndi People … and what occurs in the area of the Proposed Tenement that overlaps the Yindjibarndi #1 claim directly affects the area of the Yindjibarndi determination': NTP Contentions, paragraph 13. The Government party contends that evidence which relates to the Yindjibarndi #1 claim area is irrelevant to this inquiry. The grantee party accepts that evidence in relation to land and waters outside the intersection of a proposed licence and an objector's registered claim or determination of native title may be relevant to an expedited procedure objection inquiry if there is a clear nexus between the activities or sites outside the intersect and the issues being considered under s 237. This accords with the approach taken in previous matters.

[54] I adopt the approach of Deputy President Sumner in *Wurrunmurra v Caldera Resources* at [13], viz:

> While the evidence which relates to the whole area of the proposed licences is not entirely irrelevant it can only be considered insofar as it assists the Tribunal to decide the issues raised by s 237 in the area of the overlap …

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

Contentions and Evidence

[55] It is uncontroversial that the 'Yindjibarndi People', as determined native title holders in respect of the relevant area, are a relevant Aboriginal community for the purposes of s 237(1)(a), noting also that there is no evidence of any localised, residential community

within or close to the proposed licence area whose community or social activities may be likely to be interfered with.

[56] The native title party contends the grant of the proposed licence would be likely to directly interfere with the following community and/or social activities:

(a) the collection, recording, documentation, publishing and broadcasting of the language, history and culture of Yindjibarndi people, as carried out by the native title party and Juluwarlu Group Aboriginal Corporation;

(b) 'looking after' and managing Yindjibarndi country, including the area of the proposed licence, in accordance with the traditional laws, customs and religious beliefs of the Yindjibarndi People;

(c) 'looking after' and managing sites and areas within Yindjibarndi country of particular significance to the Yindjibarndi People in accordance with their traditional laws, customs and religious beliefs, including such sites and areas within the proposed licence area; and

(d) activities manifesting the religion and beliefs of the Yindjibarndi People including the observance, practice and teaching of religious rituals and ceremonies, associated with sites and areas of significance to the Yindjibarndi People in the area of the proposed licence.

[57] Mr Woodley describes how he and other Yindjibarndi people have been collecting information about sites, stories and songs from all over Yindjibarndi country, inclusive of the proposed licence area, for the past twelve years. The information is filed at the premises of Juluwarlu Group Aboriginal Corporation. He describes how Juluwarlu, which he established with his wife, enables the collection, recording, documentation, publishing and broadcasting of the language, history and culture of Yindjibarndi and also the management of heritage surveys for the native title party. Films and documentaries about Yindjibarndi culture have been produced and broadcast over television and radio stations and are available for purchase. Mr Woodley also refers to five books which have been provided to the Tribunal on previous occasions and requests that 'the Native Title Party be permitted to rely on them as evidence in this inquiry matter' (paragraph 68). No reference is made to the books in the native title party's contentions. I note, and endorse, the comments of Member Shurven in *Yindjibarndi v*

FMG Pilbara at [28] as to the relevance of such material and the need for guidance as to how such materials might be used in an inquiry.

[58] Mr Woodley attests to Yindjibarndi people continuing to occupy, use and enjoy Yindjibarndi country, including the land and waters within the proposed licence, and that he and other Yindjibarndi People visit the area of the proposed licence on weekends and holidays to look after country and to 'gather, hunt, camp, fish and collect artifacts [sic] and ochre' (see Mr Woodley's affidavit at paragraph 64).

[59] Mr Woodley's view is that having their native title recognised is proof that the Yindjibarndi People 'continue to undertake community and social activities over the area of the Proposed Tenement' (at paragraph 65). Even though the Tribunal may more readily infer that the determined native title rights might be exercised on the proposed licence area, that does not answer the question posed by s 237(a), namely whether 'the grant of the exploration tenement and the proposed exploration activities are likely to hamper or adversely affect the native title party in continuing, or going on with, the conduct of community activities ... in the sense there is a real risk of this happening' (see *Tullock v Western Australia* at [108]). There needs to be quantifiable evidence before the Tribunal of ongoing community and social activities on, or having a nexus with, the relevant area in order to assess whether there is a real risk of those activities being adversely affected by the exploration activities if the grant is made.

[60] In terms of managing and looking after Yindjibarndi country, Mr Woodley (at paragraphs 75-76 of his affidavit) states that making decisions about its management is a very important community activity which is required to be undertaken under *Birdarra* Law. Yindjibarndi People are said to portion a lot of time towards managing country and their decision-making process is facilitated through the native title party arranging meetings and field trips with people and companies wishing to use the land. In the event that *Ngaarda Manjangu* (Aboriginal strangers) come into Yindjibarndi country, Mr Woodley describes the provision of the *Binjimagayi* ritual as the way to work out how the stranger's relationship system compares and also the *Binga* ritual as the way to test the stranger's character where necessary. He states that following these rituals ensures these people are part of and comply by the rules of the Yindjibarndi *Galharra* system; they are performed 'during our law time'. He also provides examples of Yindjibarndi law in practice in recent years when, each year, the Yindjibarndi law bosses met with two white men who had married Yindjibarndi women,

to discuss how they could fit into the *Galharra* system. Mr Woodley also describes the great lengths taken by Yindjibarndi people to try and ensure strangers visiting their country agree to respect the principles of *Birdarra* law and they arrange for Yindjibarndi people to accompany them and inform them of safe areas.

[61] Mr Woodley states that Yindjibarndi People try to negotiate relationship agreements with mining companies, to allow proper heritage surveys, and they attend the site to ensure the mining company has cleared up (see paragraphs 82-85 of his affidavit). Mr Woodley also explains he regards the most important community activity as looking after special sites/areas of significance throughout Yindjibarndi country, inclusive of the proposed licence, in order to uphold *Birdarra* law. This is done through informing mining companies where they can go, keeping them away from special places and seeking to make agreements to accompany and inform the mining company.

[62] A significant amount of the native title party's evidence is directed to claims that the grantee party has caused fracturing within the Yindjibarndi People by 'fostering the Wirlu-Murra splinter group' and funding WMYAC. The circumstances of the grantee party being involved in the formation and ongoing business of a separate group of Yindjibarndi People, WMYAC, is described in some considerable detail in the affidavit of Mr Savas and referred to by Mr Davies and Dr Rijavec.

[63] In relation to the native title party's activity of collecting, recording, documenting, publishing, broadcasting the language, history and culture of Yindjibarndi, the Government party contends that it is unclear whether these activities are conducted over the area of the proposed licence. It accepts that there is some limited evidence that Mr Woodley and others visit, camp fish, hunt and gather resources within or around the proposed licence area.

[64] The grantee party contends interference with this activity is unlikely because:

(a) heritage surveys have already occurred which involve collecting, recording, documenting of Aboriginal culture and there is no reason why the surveys, including in respect of the proposed licence area, would cease to occur subsequent to grant;

(b) the election of some members of the native title party not to participate in heritage surveys with the grantee party undermines any contention that the

grant of the exploration will cause interference with collecting, recording and documenting of Aboriginal culture on the proposed licence area; and

(c) the native title party has already collected information about sites, stories and songs about the proposed licence area. Even though there is a 10 year collection plan for the whole of Yindjibarndi country, it is not known how much further data is required for the proposed licence area.

[65] As to 'looking after' and managing country, and sites and areas of significance, the Government party contends those obligations do not constitute an activity within s 237(a), particularly where that 'activity' is described by the native title party as 'having an agreement with the Grantee Party which sets the rules about how the Grantee Party will relate to Yindjibarndi' (NTP contentions at paragraph 57; also see Government party contentions at paragraph 44).

[66] The grantee party contends that, if 'looking after' and managing country, and sites and areas of significance are *activities* contemplated by s 237(a) which are conducted on the proposed licence area, the grant of the proposed licence is unlikely to directly interfere with those activities because:

(a) the grantee party intends to undertake heritage surveys with Yindjibarndi People prior to undertaking ground disturbing exploration activities which will assist with the protection of Aboriginal sites, and will facilitate the activities of 'looking after' and managing country, and sites and areas of significance to the extent that Yindjibarndi People wish to participate in those surveys; and

(b) given the size of the proposed licence area (218.81 square kilometres) and the unknown frequency with which the relevant activities are undertaken by the native title party, the exploration activities are unlikely to have anything other than 'a nominal impact (if any) on the physical aspects' of the relevant activities.

[67] As to activities manifesting the religion and beliefs of the Yindjibarndi People, the grantee party relies upon the lack of any evidence suggesting that these activities actually occur on the proposed licence area, or a place having any relevant nexus with that area. The

Government party contends there is no physical activity identified with which interference is likely.

[68] Assuming community and social activities are established in respect of the proposed licence area, the Government party contends direct interference is unlikely due to: the grantee party's willingness to enter into an RSHA; the lack of Aboriginal (localised) communities within the proposed licence area; the native title party's activities already having been affected by both prior mineral exploration and the overlapping pastoral leases; the low-scale nature of the exploration activities proposed; and the ability for co-existence between activities such as hunting and mineral exploration.

[69] The Government party's contention about interference being unlikely by way of past exploration and underlying tenure requires comment. I note that approximately 85.5 percent of the proposed licence is subject to pastoral lease, which is capable of co-existing with the determined native title rights. Any 'extinguishing' effect of the pastoral lease and past exploration over the proposed licence area has already been taken into account with the determining of non-exclusive rights. What remains are co-existing native title rights the exercise of which may, in practice, be interfered with (but not extinguished) by exploration activities conducted by the grantee party if the proposed licence is granted. It is the consequences of the grant of the proposed licence on the carrying on of community or social activities of the native title party, holding non-exclusive native title rights, which are the focus of the s 237(a) inquiry.

[70] In essence, the native title party's evidence and contentions in respect of s 237(a) (at NTP contentions, paragraph 55) come down to an assertion that the consequences for the Yindjibarndi People of the proposed licence being **granted through the expedited procedure** are that:

> the members of the Yindjibarndi People ... will be prevented from undertaking community activities such as protecting and maintaining Yindjibarndi cultural and intellectual property, and properly looking after and managing relevant areas of land and waters, and the sites and areas of significance situated therein, in the manner required of them, pursuant to their traditional laws and customs and their religious beliefs; and, that this will inflict suffering upon the members of the Yindjibarndi People, and cause damage to the Yindjibarndi People as a community.

[71] Regretfully, there is no evidence from the native title party which can assist in the Tribunal's consideration of whether **the grant**, and the consequent exploration activities, are likely to affect those community activities

[72] To ask the question through the prism of consequences for the Yindjibarndi People if the right to negotiate does not apply is not to the point. The question is, **should** the right to negotiate apply because of the likely effect the exploration activities will have on the community and social activities of the Yindjibarndi People. If the community and social activities of the Yindjibarndi People are likely to be interfered with directly by the grant of the exploration tenement and exploration activities, the consequences are that the right to negotiate will apply; the corollary is that it will not apply if the grant and exploration activities are not likely to so interfere.

Consideration of s 237(a)

[73] Whilst the activity of collecting, recording, documenting, publishing, broadcasting the language, history and culture of Yindjibarndi may be considered to be community and social activities for the purposes of s 237(a), the native title party's evidence is cast in broad terms, regarding activities done on Yindjibarndi country and is not particular about these activities being conducted on any part of the proposed licence area, or any area which may be adjacent to or nearby the area.

[74] There may be physical activities associated with 'looking after' and managing country and sites. However, that is not made apparent on the evidence in this case. The most important community 'activity' in looking after country and sites appears to be agreement-making. I agree with the Government party that entering into agreements with the grantee party is not a community or social activity within the meaning of s 237(a) of the Act; among other things, it is not a physical activity. The 'strongest' evidence of physical activity in connection with 'looking after' and managing country and sites appears to be that sometimes Yindjibarndi people go out with people wanting to conduct activities on Yindjibarndi country 'to keep them away from our special places' (Woodley affidavit at paragraph 9.6). In the context of the evidence provided by the native title party I would not characterise 'looking after' and managing country and sites as a 'community or social activity' for the purposes of s 237(a). But even if it was, then the evidence of any 'activities' carried out is of little or no assistance on the question of where and how they are conducted on any part of the proposed licence area, or an area adjacent or nearby.

[75] In relation to activities manifesting the religion and beliefs of the Yindjibarndi People, I accept the general notion that a physical element is required, whether in the absence of or in

addition to a spiritual element, for the assessment under s 237(a); see, for example, the discussion in *Tullock v Western Australia* at [65]-[77] and *Silver v Northern Territory* at [57]. For example, conduct of ceremonies by the Yindjibarndi on the land could be a 'community activity'. However, there is nothing in the evidence to suggest that activities 'manifesting the religion and beliefs of the Yindjibarndi People' occur on the relevant area or on a place having a nexus with it, other than the *Wuthurru* ritual performed by Mr Woodley and described at [82] below. There may be some difficulty in characterising the activity conducted by him, as an individual, as a 'community activity'. However, even if the *Wuthurru* ritual did have a 'dimension that transcends the person involved' (*Silver v Northern Territory* at [60]) so that it was a relevant community activity, there is no material available to me upon which I can find that the proposed licence is likely to have a substantial impact on that activity.

[76] Despite the native title party providing over 1000 pages of material to the Tribunal, there is no useful information to assist the Tribunal in its consideration of how (if at all) any proposed exploration activities will interfere, in a practical way, with the carrying on of the 'activities' relied upon by the native title party.

[77] Expedited procedure inquiries are designed to be conducted in an informal, quick and economical manner: see s 109(1) of the Act. There is no onus of proof as such, but a commonsense approach to the evidence means that parties will produce evidence to support their contentions, particularly where the facts (such as how proposed exploration activities will impede or adversely affect the native title party by reference to the criteria in ss 237(a) and (b)) are peculiarly within their knowledge: *Western Australia v Hughes* at [18].

[78] If a party fails to provide relevant evidence on critical aspects of the Tribunal's inquiry, the Tribunal will proceed to make a determination based upon the information before it. This may result in evidence from another party, putting a contrary position, assuming greater weight than it would otherwise have where there was balancing evidence to be considered.

[79] In the circumstances, taking into account the evidence available, I am unable to conclude that the grant of the proposed licence and the proposed exploration activities are likely to interfere directly with the carrying of the community and social activities of the native title holders.

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

Evidence and contentions in relation to the existence of any sites of particular significance

[80] The native title party states there are sites of particular significance located within and near the proposed licence, none of which are registered with DIA, and relies upon the evidence of Mr Woodley (at paragraphs 91-95 of his affidavit) in this regard.

[81] At paragraph 91 of Mr Woodley's affidavit, he explains significant sites within an area that overlaps the proposed licence:

> The area where FMG wants to explore overlaps *Buthurnha Ngurra*. There are many sites, objects and places in the parts of that *Ngurra* that will be affected by the Proposed Tenement, which are of particular significance to the Yindjibarndi People, in accordance with our religious beliefs. Under the *Birdarra* Law we are obliged to protect these sites, objects and places and are held accountable to the *Marrga* for their welfare. These sites and special places include all *Wundu* (watercourses), *Yirrgarn* (birthplaces,), *Thungari* (burial sites), *Yamararra* (caves and rock-shelters), *Thalu* (increase sites and healing sites), *Maninagrli* (rock paintings and engravings), *Budbungarli* (artefacts), *Yarna-ngarli* (Ochre quarries) and *Wurrungarli* (special hunting hides). Some of these places are inhabited by *Marrga* and, under the *Birdarra* Law, a person from the *Galharra* group that matches each place must first approach to introduce *Manjangu*.

[82] Mr Woodley describes the *Wuthurru* religious ritual he performs throughout Yindjibarndi country, and within the proposed licence, when he comes across *Wundu* (watercourses) and *Jinbi* (springs), to let the *Barrimirndi* serpent of the Fortescue River and *Marrga* (powerful creative spirit beings who gave form to everything that is Yindjibarndi in the *Ngurranyujunggamu* creation times) know of his presence as a Yindjibarndi person and also to avoid harm from the serpent. The ritual consists of speaking to the country in its language, sipping the water and spraying it back into the water (at paragraph 94(i) of Mr Woodley's affidavit).

[83] Mr Woodley, at paragraph 37 of his affidavit, refers to 'pictures of the *Marrga* carved in rocks and painted in *Yamararra* (caves and rock-shelters), which were left behind for us today as proof that the *Marrga* are still here and watching us to make sure we are looking after our country' as being located throughout Yindjibarndi country, including within the proposed licence area. Other aspects of the proposed licence area's significance are that many *Wundu* run through it and 'there are many pools, wells creeks and *Jinbi* (springs) which are important water sources and significant places to Yindjibarndi People'; Yindjibarndi law requires these water sources to be looked after (see paragraph 73). The significance of the water appears paramount because 'if the water resources dry up everything else will die. For

Yindjibarndi people, it is our homes, our spirit and our souls, it is our essence of being' (see paragraph 74).

[84] Mr Woodley refers to the map annexed to his affidavit in which he and Mr Angus Mack have shown the locations of some of the sites, with the qualification that it is 'impossible to depict the locations of every sacred site and object in the area affected by the Proposed Tenement' (paragraph 92). He notes exact precision is not possible without going there with a GPS. Most of the sites shown on the map appear to be located within the proposed licence area, with several clusters of sites within and towards the southern boundary of the area. At paragraph 94 of his affidavit, Mr Woodley explains some places depicted on the map, which he has visited with members of the Yindjibarndi community and *Ngurrara-ngali* for the *Buthurna Ngurra*. Those places are summarised as follows:

(a) *Yandarniyirra Wundu* (The Fortescue River) (which can be accepted as passing through the proposed licence area by reference to publicly available resources). It is a holy place of great significance to the Yindjibarndi People and is the centre of Yindjibarndi law. He explains the Yindjibarndi belief of its creation by a *Barrimirndi* rainbow serpent and the layout of the land being caused by the serpent's movements. The *Wundu* (watercourses) and *Jinbi* (springs) are significant as they are regarded as dangerous places, being the home of the serpent and requiring the performance of a religious ritual *Wuthurru* (as described at [82] above).

(b) *Marnda* (hills). Mr Woodley refers to many hills of significance located within the proposed licence area. He states that *Yamarrara* (caves), some of which hold the physical remains of old people, are located within the hills. Some of the hills, referred to as being *Nhunmarda Marnda*, are significant as they allow a viewpoint to see all Yindjibarndi country from all directions.

(c) *Gurdi* (pebble mouse mound). It is said that there are at least 150 gurdi sites within the proposed licence area and they stated to be significant due to the Yindjibarndi religious beliefs. Mr Woodley refers to descriptions of pebble mouse mound from Mr Jacob's evidence. In Mr Jacob's affidavit sworn 12 July 2013, he reaffirms his statements about the pebble mouse as found in his affidavit of 20 January 2012 (Annexure TJ 3 to his affidavit). Mr Jacob describes the significance of the *Burndud* song for the pebble mouse, which is sung by Yindjibarndi People every year, and the

need to protect the pebble mouse as it is one of the bosses of the country and is significant through their law. He refers to several pebble mouse mound sites registered with DIA as ethnographic sites. I note that these registered sites are outside of the proposed licence area, but it does indicate the significance of the pebble mouse generally.

(d) *Thurwanha Ngurra* and *Gulyin* (two separate hunting grounds). These grounds are used for hunting kangaroos and emus. Yindjibarndi people camp in this particular area due to the low-set watercourses there. *Budbungarli* artefacts are found there which are regarded as demonstrating enjoyment by *Thurwanha* and *Gulyin*.

(e) *Yamararra* (caves). These are regarded as very significant. Some of the caves contain *Budbungarli* (artefacts) indicating occupation by old Yindjibarndi people and they also contain grinding stones.

(f) *Marningarli* (engraving). This engraving indicates to Yindjibarndi People that there is water nearby.

(g) *Ganyjingarrigunha Wundu* (religious site). This is said to be a 'highly religious site' for Yindjibarndi. It is a watercourse that runs through the middle of *Ganyjingarringunha Ngurra,* is said to have permanent rock pools and camp spots along the watercourses and also hold the presence of the *Barrimirndi* serpent. Mr Woodley provides a translation of the *Warlu* song about this religious site and explains there are scar trees at this site indicating occupancy of Yindjibarndi people. The site is also visited by Yindjibarndi people travelling through to *Wirlumarranha* during the law ceremony time.

(h) *Garngambinha Wundu* (watercourse). This is said to be in the proposed licence area. Yindjibarndi people camp in this area due to the good sources of water found in the surrounding pools.

(i) *Buthunha Wundu* (Hooley Creek religious site). Mr Woodley describes the high religious significance of the site and the permanent rock pools and camp spots along this watercourse. Yindjibarndi people sing about this watercourse, all the way to *Winyjuwarranha* (Hooley station).

[85] In addition to these places Mr Woodley states there are other significant areas and sites, located both within and outside the proposed licence, which he is not allowed to describe due to concerns about conduct of the grantee party in conjunction with the Yindjibarndi splinter group (WMYAC). At the native title party's Annual General Meeting of 12 March 2012, it was affirmed that the native title party is to continue to operate under the management of Juluwarlu Group Aboriginal Corporation in order to manage the cultural knowledge and Mr Woodley elaborates upon the restricted distribution of this cultural knowledge.

[86] The native title party contends that the sites located outside, though near, the proposed licence would also be interfered with by the grant of the proposed licence. The grantee party accepts that the general principle that sites outside a proposed licence can be relevant in certain circumstances.

[87] Mr Woodley also details the significance of all Yindjibarndi country, explaining it is 'acknowledged and respected by all *Ngarrda* as a holy place because it is the place where all Law began' (at paragraph 35 of his affidavit). He also explains key features of *Birdarra* law, such as: how their country will look after and provide for Yindjibarndi people if they look after their country (referred to as the sacred promise of *Minkala*, told to Yindjibarndi people by the *Marrga*); how suffering will occur through sickness or death, or through the country drying up, if the *Birdarra* law is broken by Yindjibarndi People or others (see paragraph 39-41); and the *Galharra* system of rules governing Yindjibarndi relationships and the way in which work and resources must be shared (see paragraph 42-44). This system of rules 'determines who should first approach a particular *Yinda* (permanent pool) or *Wundu* (watercourse) and who should drive any particular *Thalu* (sacred site); there are consequences for breaking the rules about sharing resources.

[88] Mr Woodley also describes the physical division of Yindjibarndi country which is important for ceremonial activities, detailing that it is divided up into 13 home areas known as *Ngurra*, and each *Ngurra* is divided into four further parts. Each *Ngurra* is believed to have its own *Thalu* (sacred sites where religious ceremonies are performed) and its own sacred resources, including *Yarna* (ochre) and *Gandi* (sacred stones) which are used in religious ceremonies. It is anticipated by Mr Woodley that the proposed licence would affect *Buthurnha Ngurra*, which includes descendants of various apical ancestors, because it overlaps that home area (see paragraphs 51-56).

[89] I accept that Mr Woodley has a great deal of knowledge in relation to sites relevant, and important, to the native title party. The question for the Tribunal is whether, through the information and evidence provided, it can be said that the sites and areas referred to are of 'particular significance' according to the traditions of the Yindjibarndi People.

[90] In Mr Woodley's affidavit, he describes his concern in relation to divulging detailed information about 'other areas and sites of particular significance' due to the conduct of 'FMG' in supporting WMYAC and past occurrences of damage to 350 sites by 'FMG' in a form of partnership with WMYAC. I note that Mr Woodley uses 'FMG' to refer to the grantee party, however, the evidence relating to the matters he refers to is clear that the relevant body there was Fortescue Metals Group Limited. However, as I have accepted that the conduct and actions of the grantee party's controlling entity, Fortescue Metals Group Limited, is relevant to the Tribunal's consideration in this matter, little turns on the anomaly.

[91] Whilst I appreciate there may be information about sites which is particularly sensitive to a native title party in accordance with their traditions, as Member Shurven pointed out in *Yindjibarndi v FMG Pilbara* at [86], the obligation is on the native title party to provide evidence with sufficient detail and specificity to allow the Tribunal to make the predictive assessment required by s 237(b), noting that there are mechanisms which can be put in place to limit the dissemination of such information, rather than not providing it at all. However, in my view it would need to be established that there was a traditional basis for limiting disclosure such as material being culturally sensitive, as opposed to non-disclosure because of the apparent dissension within the group of native title holders or a level of distrust towards the grantee party.

[92] I note Mr Woodley's concern, supported in other affidavits provided by the native title party, that the grant of the proposed licence without the right to negotiate would allow opportunity for the grantee party, in partnership with WMYAC, to dispossess the native title party of their cultural inheritance (see paragraph 28 of Mr Woodley's affidavit). Detailed evidence has been provided about Fortescue Metals Group Limited's conduct in the past, particularly in relation to applications under s 18 of the AHA. I will return to this in my consideration below.

[93] The grantee party contends there is insufficient evidence as to whether places referred to by Mr Woodley are within or outside the proposed licence area, with the exception of

Marnda (hills), *Gurdi* (pebble mouse mounds) and *Garngamninha Wundu*, which are expressly referred to as being within the relevant area. Apart from references to lack of geographical precision in locating places, the grantee party also contends that the nature of the significance of places has not been sufficiently explained for the Tribunal to find that there are any sites or areas of particular significance for the purposes of s 237(b). The Government party's contention is to the same effect.

Evidence and contentions in relation to whether interference is likely

[94] The native title party asserts that interference with sites of particular significance is likely unless avoidance procedures can be implemented through the consultation and negotiations which would be available under the right to negotiate (that is, if the expedited procedure were found not to apply). The native title party holds the view that the right to negotiate is required, partly due to the ongoing conduct of 'fostering of a splinter group of Yindjibarndi People and its financial support of the WMYAC' (at paragraph 112 of its contentions). I repeat my comments at [70] to [72] above, made there in respect of the native title party's approach to the s 237(a) criteria; it applies equally in respect of this aspect of the inquiry.

[95] I appreciate that in *Parker v Iron Duyfken* at [43], Member O'Dea found that the expedited procedure should not apply, going on to say:

> Unless there are the negotiations contemplated by s 31 of the Act, there seems to me to be a real risk of interference with sites, even if inadvertent. As previously noted, the proposed licence is largely within the Karijini National Park, a large portion of such licence seemingly affected by a number of registered DIA sites, including the 6 registered sites of Ashburton 06, Mt Windell, Bardulanha, Buddunmurra, Tjurruruna and Mt Bruce Sacred Area, which have been identified. Consultation will need to occur with the native title party to ensure that they are avoided. If this does not occur there is a real risk of interference with them.

[96] However, that determination was made in the context of the grantee party providing no specific evidence of what it intended to do about the protection of sites, including whether it would conduct a heritage survey or otherwise consult with the native title party about them.

[97] By way of contrast, in the present matter, the grantee party contends that the grant of the proposed licence would be unlikely to interfere with any areas or sites of particular significance because the grantee party (relying, in fact, on evidence relating to Fortescue Metals Group Limited and its wholly owned subsidiaries, referred to below as 'FMG' for convenience):

(a) is aware of its cultural heritage obligations under the AHA and abides by the *Guidelines for Consultation with Indigenous People by Mineral Explorers*, as published by DMP in July 2004 (see paragraphs 7-12 and 16 of Mr Weaver's affidavit);

(b) has adopted processes to avoid interference with Aboriginal sites (see paragraphs 13-14 of Mr Weaver's affidavit); and

(c) has a policy not to undertake ground-disturbing activities without a heritage survey having first been undertaken (see paragraph 17 of Mr Weaver's affidavit).

[98] In outlining the grantee party's attention to cultural heritage matters, Mr Weaver describes FMG's Ground Disturbance Permit Procedure, which stipulates that its staff and contractors cannot disturb any area unless a Ground Disturbance Permit has been issued. He also refers to FMG's creation of its *Guidelines for the Management of Aboriginal Cultural Heritage* (see paragraphs 9-11 of his affidavit). He provides details of regular Aboriginal heritage surveys within the Yindjibarndi #1 area undertaken by FMG in support of the proposition that the grantee party would undertake Aboriginal heritage surveys with the participation of Yindjibarndi People over the proposed licence prior to undertaking any ground disturbing work (see paragraphs18-20).

[99] The Government party similarly contends that, if any areas or sites of particular significance were to be established, it is unlikely that any area or site would be directly interfered with due to:

(a) the impact of the previous and current use of the area, comprising prior exploration activity and the current overlapping of two pastoral leases. This submission overlooks the reality that the exploration activities in respect of the proposed licence may be of a different type etc than previous activities;

(b) the low-impact and non-intrusive exploration activities by way of exploration methodology. I have already noted that the only information provided about exploration proposals was some nine years ago, leaving open the possibility that a different methodology may now be employed, particularly in light of Mr Weaver's emphasis on procedures in respect of ground disturbing activities;

(c) the grantee party's willingness to provide a mechanism for consultation through offering an RSHA, regardless of whether it is accepted or not by the native title party; and

(d) the operation of the AHA.

[100] The Government party notes that the native title party's concerns with the grantee party's compliance with the AHA relate to previous **mining** activities carried on by FMG, where what is proposed here is exploration activities, said to be 'very low-impact, ... limited in scope and mostly non-ground disturbing' (Government party contentions at paragraph 88).

[101] Leaving aside the issue of whether sites of particular significance exist, the grantee party contends the native title party has not addressed how interference might arise in respect of any place it refers to. I agree with that contention. By focussing on the conduct of Fortescue Metals Group Limited, including its relationship with WMYAC, in the course of attempting to show what it says are the consequences of the expedited procedure being found to apply, the native title party has neglected to focus on the very evidence which provides the Tribunal with a basis for finding that the expedited procedure does not apply.

Presumption of regularity

[102] It is well established that the presumption of regularity applies when making the predictive assessment required by s 237 of the Act. In *Walley v Western Australia* at [11], the Tribunal said:

> Unless there is evidence to the contrary the Tribunal will act on the basis that the government will exercise its powers including making discretionary decisions properly and in accordance with the law; and that a grantee party will not act contrary to the law and regulatory regime including conditions imposed which governs the exercise of rights under the grant: *Western Australia v Smith* at 51-52 [37]); *Ward v Western Australia* (at 228 and 230); *Little* (at [76]-[77]).

[103] There is a dispute as to whether the presumption of regularity applies in this case. The native title party contends the Tribunal should not rely upon a presumption of regularity to the effect that the grantee party will act lawfully in exercising its rights under the proposed licence. It contends the grantee party has a 'history of non-compliance with the regulatory regime, and a demonstrated record of disregard for the protection of sites of particular significance to the Yindjibarndi People'. It also contends that there is evidence which demonstrates that public officers and Government departments responsible for monitoring

and enforcing heritage protection have not been able to enforce compliance by the grantee party with environmental and Aboriginal heritage conditions.

[104] Reliance is placed upon submissions by DAA (then DIA) to the Functional Review Committee established to review the Department's performance in 2006, the associated report entitled *Report of the Review of the Department of Indigenous Affairs* and the Auditor General's report entitled *Ensuring Compliance with Conditions on Mining*, published in September 2011).

[105] In addition to criticising the enforcement of the regulatory regime, the native title party also asserts that the grantee party (referring here to Fortescue Metals Group Limited and its wholly owned subsidiaries) has a history of non-compliance and disregard for the protection of Yindjibarndi sites. It also contends (at paragraph 41) that the grantee party has 'undertaken, nurtured and encouraged, division within the Yindjibarndi community in relation to Yindjibarndi heritage' and 'undertaken and funded a deliberate and aggressive "divide and conquer" campaign fostering a split within the Yindjibarndi People in order to achieve particular future act and heritage related outcomes'. This is clearly a reference to the relationship between FMG and WMYAC.

[106] The Tribunal has previously examined the existence and circumstances surrounding WMYAC in the context of whether or not there had been negotiation in good faith by the present grantee party in respect of the grant of various mining tenements; see, for example, *FMG Pilbara v Yindjibarndi* at [37]-[38]. In that matter, the Tribunal found that any division within the Yindjibarndi community was 'related not to the machinations of the grantee party, but to genuine disagreement within the group'.

[107] I have had careful regard to the large amount of material provided by the native title party focussing on the relationship between FMG, WMYAC and the native title party. It is clear that there is serious dissension within the Yindjibarndi People, which appears, on the evidence, to date back at least to the time when the Yindjibarndi People 'broke away' from the Pilbara Native Title Service ('PNTS') in the period 2007 to 2008. The native title party has provided extensive material and submissions in an attempt to make out a case that the actions of FMG have caused, and continue to foster, the dissension within the Yindjibarndi People. However, according to the evidence of Mr Davies (at paragraph 5.1), the genesis of

WMYAC in about 2010, was a 'small number of members [of the Yindjibarndi community] who had been unhappy at YAC's separation from PNTS' several years earlier.

[108] There is no doubt there is genuine disagreement within the Yindjibarndi People which is hampering agreement making with the grantee party. Likewise, based on the evidence available in this matter, there is no doubt the grantee party has a closer relationship with WMYAC than with YAC with which it is clearly in conflict.

[109] Be that as it may, the native title party has not established why that relationship is relevant to any displacement of the presumption of regularity. That is, it has not addressed how the relationship between WMYAC and FMG would lead the Tribunal to find that the grantee party will not comply with any relevant regulatory regime in respect of the proposed licence.

[110] As to the allegation that the grantee party has a history of non-compliance with the regulatory regime, the evidence to which the Tribunal was directed by the native title party details only one 'site of particular significance, 'Ganyingarringunha Jinbi' (Kangeenarina Spring). This area, described as a natural spring, was damaged by FMG in 2007 and for which FMG provided a written apology and further agreed to pay to the native title party a penalty of $25,000 for any future disturbance of sites as defined in the AHA, that have been identified by a heritage survey team. Rather than show a **history** of non-compliance, I accept that the evidence in respect of that site supports the argument of the grantee party that it has regard for the regulatory regime and 'is confident of complying with it'.

[111] In support of its allegation that the grantee party has disregard for protection of Yindjibarndi sites of significance, the native title party appears to rely principally upon events following two notices given by FMG under s 18 of the AHA in February 2011. Together, the grantee party's notices identified 10 sites, whereas the native title party later identified an additional 22 sites, and at least 250 rockshelters and caves on the area subject to the notices. The evidence does not suggest that the grantee party disputed the existence of the additional sites, rockshelters or caves; rather, the Minister gave conditional consent to FMG which required FMG to consult with YAC before commencing mining activities to clarify the status of heritage places and to identify all heritage values associated with the land, and to provide the Registrar with specified information prior to commencing mining activities. A review of that consent, initiated by FMG, apparently led to variation of the conditions of the consent

(according to the grantee party) or deletion of the conditions (according to the evidence of Mr Woodley). It appears from the evidence of Mr Savas, that one of the varied (or deleted) conditions related to the undertaking of ground disturbing activities within the floodplain of Kangeenarina Creek (elsewhere identified as 'Ganyingarringunha Wundu Yaayu'). Whilst the native title party may have genuine concerns about the outcome of the AHA regime, including the review processes, in this particular case, that does not advance an argument that the grantee party has a disregard for protection of sites of significance. Indeed, by actively seeking s 18 consents, it might also be said that the grantee party has shown an awareness of the regulatory regime, and an intention to comply with it.

[112] The native title party's complaint appears to be directed at the administration of the AHA and consents provided under it, complaining that, particularly in Yindjibarndi country, it has 'become a matter of common practice for the Minister's consent to be granted to enable exploration to proceed such that the regulatory scheme is ineffective', citing *Dann v GPA Distributors*.

[113] In that case, the Tribunal rejected the submission of the native title party in the following words:

> I do not consider that the fact that there is a Ministerial discretion, even if able to be exercised according to criteria which may not exist in the NTA, which permits interference with sites is of itself sufficient to say that there is likely to be in every case of this kind interference with sites. It would be necessary to look at the exercise of the Minister's discretion in this category of case and conclude that it had become a matter of common practice for the Minister's consent to be granted to enable exploration to proceed, such that the regulatory regime is ineffective.
>
> Does the evidence lead to that conclusion? The objector's argue that the general regime including the decisions of the Aboriginal Cultural Material Committee and the actual decisions made by the Minister mean that the Government's regime is ineffective. **Again I cannot reach that conclusion.** (emphasis added)

[114] I adopt the approach of Member Shurven in *Yindjibarndi v Croyden Gold*, at [32]. The s 18 consent figures relied upon by the native title party, extracted from the Annual Report of DAA for 2011-12, do not allow the Tribunal to reach the conclusion pressed by the native title party, that the regulatory scheme is ineffective. The figures relate to one year only (and are not the most recent in any event). Nor do they disclose how many relate to exploration or more extensive mining activities, or how many were unrelated to mining. The bare figures provide no information as to whether any conditions were imposed, or the nature

of those conditions which might have ensured long term protection of sites, or whether the sites were archaeological or ethnographic, the latter being more easily identified as sites of particular significance in accordance with the traditions of native title parties than the former (as noted by the Tribunal in *Dann v GPA Distributors*).

[115] It may be that the native title party can take some comfort from the more concrete evidence which discloses that, in July 2013, DAA conducted an audit of FMG's compliance with conditions imposed by the Minister under s 18(3) of the AHA in respect of FMG's Solomon Project, including conditions that certain sites not be disturbed. The undertaking of such audits runs counter to the native title party's argument as to the 'inability of the relevant Government departments to properly monitor compliance' and that 'Government departments simply do not know if grantee parties are in compliance': see NTP Contentions at paragraph 33. In my view, the specific evidence of the relevant Department monitoring compliance of FMG with conditions imposed on s 18 consents in 2013, is considerably more useful to me for the purposes of this inquiry than an Auditor General's Report published in 2011 which not only does not refer to any particular grantee party, but provides a response from the relevant Department (the DIA) at page 11 of the Executive Summary which reads:

> DIA has now resourced and improved its compliance management systems for monitoring conditions and reporting. DIA has instigated a major reform of the agencies information systems that will allow for the on line tracking of approvals and compliance and improved accuracy of spatial data relevant to site identification.

[116] It might be inferred that the audit of FMG's compliance conducted by DAA in 2013 indicates a focus on improving DAA's compliance management systems.

The interaction of the Aboriginal Heritage Act with the Act

[117] The native title party contends that the AHA cannot be relied upon to protect all sites, places or areas of particular significance, as there are areas which would not attract the protective regime of the AHA, despite being within the terms of s 237(b) of the Act. The distinctions drawn by the native title party between s 237 of the Act and ss 17 and 18 of the AHA is that s 237(b) refers to significance to the native title party, where as the AHA refers to significance to the State, and s 237(b) refers to *areas* or sites of particular significance whereas the AHA is confined to *places* or sites of 'special significance'. Further, it is said that the offence under s 17 of the AHA is more restrictive than the concept of 'interference'

under s 237(b) of the Act, with the result that a grantee party may 'interfere' with a site but not be in breach of the AHA.

[118] It may be accepted that the concepts outlined in s 17 of the AHA do not "cover the field" of interference as understood by section 237(b): see *Young v South Coast Metals* at [57]. However, in order to convert that general proposition into a finding that there is likely to be interference with areas or sites of particular significance to the native title party in accordance with its traditions, the Tribunal must have regard to the material before it in a particular matter. In *Young v South Coast Metals*, there was evidence of a declared protection area which covered a sizeable proportion of the proposed licence, and no evidence that the grantee would segregate the tenement between the declared area and the remaining part of the tenement, nor any evidence of steps which would be taken to reduce any likelihood of interference. On the scant material before the Tribunal in *Young v South Coast Metals*, Deputy President Sosso (at [61]) was of the view that it was 'impossible not to come to the conclusion that there is a real risk of interference within the meaning of section 237(b)'. Relevantly, however, the Deputy President went on to say:

> I would not want it to be perceived that this determination signals a different approach to the interpretation of section 237(b) than has hitherto applied. Although I have found that section 17 of the *Aboriginal Heritage Act 1972* does not "cover the field" of interference for the purposes of section 237(b), the facts in this inquiry were unusual and the material presented by the parties scant. It would only be in unusual or exceptional cases that the protection afforded by section 17 would not suffice to the [sic] deal with the issue of interference. However, as this inquiry illustrates, there may well be instances where section 237(b) requires the Tribunal to look beyond section 17.

[119] As to the distinction drawn by the native title party between 'places' or 'sites' under the AHA and 'areas' or 'sites' of particular significance under the Act, the wide compass of the applicability of the AHA to places and objects is well recognised: see, for example, *Young v South Coast Metals* at [36]-[37]. So too it is understood that registration of sites under the AHA does not lead to the conclusion that they are sites of particular significance to the native title party in a particular case: see *Young v South Coast Metals* at [36], referring to *Western Australia v McHenry.*

[120] Irrespective of the differences between terminology in the Act and the AHA, it remains the case that the Tribunal must consider the evidence provided in a particular matter to decide whether or not the protective regime of the AHA is sufficient to make it unlikely that there will be interference with sites or areas of significance. In many cases it has been found that the operation of the AHA is sufficient to ensure any interference is unlikely; in

some matters the Tribunal has concluded otherwise, where the evidence warrants such a conclusion. What is essential in this inquiry is that an area or site which is said to be of particular significance must be known and must able to be located and the nature of its significance explained to the Tribunal: see [17](b) above. Should there be any concerns regarding confidentiality of materials in relation to the location or significance of sites, the Tribunal will always consider issuing relevant non-disclosure orders in relation to that information, as per s 155 of the Act: see also [91] above.

[121] The native title party further contends that sites may be destroyed pursuant to provisions of the AHA by way of ministerial discretion which can permit interference in some circumstances (referring to *Tullock v Western Australia* at [54]). Again, this is an uncontroversial statement made in general terms, but it does not address the particular act the subject of the inquiry and the Tribunal's task under which is to assess the evidence regarding whether there are sites of significance in the relevant area and to consider whether the regulatory regime is sufficient to make interference with them unlikely.

Regional Standard Heritage Agreement (RSHA)

[122] The Government party and grantee party refer to conduct in relation to the proposed RSHA in support of avoiding interference with any sites of particular significance. Reference is made to *Tullock v Western Australia* at [52]-[54] in asserting that the Tribunal can have regard to a grantee party's attitude to entering into an RSHA for the purposes of the predictive assessment under s 237(b). The Government party outlines some of the general features of an RSHA agreement, including that the grantee party must: notify the native title party and provide detailed information about proposed on-ground works; consult about surveys of the land in relation to ground-disturbing works prior to carrying them out; carry out surveys with the participation of the native title party prior to commencing work in some circumstances; and consult the native title party before applying for consent under s 18 of the AHA. However, although the grantee party has offered to enter into an RSHA, the native title party states it has not endorsed and does not accept the RSHA as adequately dealing with concerns in relation to s 237 of the Act. In elaboration, the native title party states 'provisions of the RSHA which require consultation with, as opposed to consent of, the native title party prior to lodging an application under s 18 of the AHA to destroy sites is not

aimed at the protection of sites; it arguably enables their destruction' (at paragraph 85 of its contentions).

[123] It is not suggested by the Government party (or the grantee party) that an executed RSHA will deal with all concerns in relation to s 237 of the Act, so that it would form the basis for a finding in every case that the expedited procedure is attracted. Rather, the Tribunal 'can have regard to the grantee party's attitude to the RSHA (particularly if the grantee party is prepared to enter into it with the actual objector) and other evidence of the grantee party directed towards the protection of Aboriginal heritage': *Champion v Western Australia* at [34].

[124] The native title party seems to adopt an approach predicated upon 'consent' of the native title party to an activity being a precondition to a finding that an act is unlikely to interfere with an area or site of significance. The same theme of necessary 'agreement' runs through the contentions and evidence in respect of the ss 237(a) and (c) criteria. However, I agree with Deputy President Sumner's reasoning in *Tullock v Western Australia* at [120], that it was not Parliament's intention that the native title party have 'a virtual veto over whether the expedited procedure would ever be attracted to exploration activity'.

Consideration of s 237(b)

[125] For s 237(b), the Tribunal is required to assess whether there is likely to be (in the sense of a real chance or risk of) interference with areas or sites of particular significance to the native title party in accordance with its traditions. The precondition in the inquiry is the identification of relevant areas or sites of particular significance.

[126] In relation to the DIA Register, it is well-established that a site of particular significance can be found to exist even if it does not appear on the DIA Register as 'registered' or 'other heritage place'. The Register does not purport to be a conclusive record of all Aboriginal sites (see *Parker v Ammon* at [68]).

[127] Importantly, the native title party is required to provide evidence of areas or sites of particular significance, and to adequately describe and explain the nature of the significance. The native title party has provided evidence of various sites within the proposed licence, inclusive of pictures of the *Marrga* inside caves (see paragraph 37 of Mr Woodley's affidavit). There are said to be *Wundu* (watercourses), *Thalu (*increase and healing sites),

Budgungarli (artefacts), *Yarna-ngarli* (ochre quarries), *Wurrungarli* (special hunting hides), *Yamararra* (caves and rock shelters), *Thungari* (burial sites) and *Yirrgarn* (birthplaces) in parts of the *Buthurnha Ngurra* that will be affected by the proposed licence (see paragraph 91 of Mr Woodley's affidavit). Mr Woodley has also described ten specific sites, or types of sites, as depicted on the map annexed to his affidavit, and explained the reasoning behind each, though it is not clear from the map which of these are within and which are near the proposed licence (see paragraph 94 of Mr Woodley's affidavit). Some *Marnda* (hills containing physical remains of old people), at least 150 *Gurdi* (pebble mouse mounds) and a *Garngamninha Wundu* (watercourse area used for camping, and a hill by the same name for collecting ochre) are three of the ten sites, or types of sites, described in detail by Mr Woodley, expressly described as being within the proposed licence area (see paragraph 73, 94(ii)-(iii) of Mr Woodley's affidavit). As already noted, it can be accepted from publicly available material that *Yandarniyirra Wundu* (the Fortescue River) runs through the proposed licence.

[128] The map provided by Mr Woodley marks a great number of sites, with numbers labelled on some sites, in relation to the boundary of the proposed licence. Although the location of the sites is not shown with any precision, his affidavit evidence that these sites, and types of sites, exist on account of his detailed knowledge of the area is important.

[129] The difficulty that I have with the native title party's evidence is that it does not provide the Tribunal with a basis for assessing the **particular** significance of areas and sites within the proposed licence area or close to it. Rather the sense of the evidence is that there are a number of culturally significant areas and sites across Yindjibarndi country of particular types, that is, *Wundu* (watercourses), *Thalu (*increase and healing sites), *Budgungarli* (artefacts), *Yarna-ngarli* (ochre quarries), *Wurrungarli* (special hunting hides), *Yamararra* (caves and rock shelters), *Gurdi* (pebble mouse mounds), *Thungari* (burial sites) and *Yirrgarn* (birthplaces). Some of these are found within the proposed licence area. If such a distinction is not drawn, and the significance of particular areas or sites in relation to other sites of a similar nature is not addressed, then the Tribunal is left with no basis for determining whether or not there are areas or sites of 'special or more than ordinary significance' (see *Cheinmora v Striker Resources* at 34).

[130] I have paid careful attention to the material provided by the native title party, but have been unable to discern any sites or areas of particular significance within the proposed licence

area, or which otherwise may be interfered with by relevant activities under the grant. Following are my reasons for this conclusion, by reference to the sites, or types of sites, referred to by Mr Woodley and summarised at paragraph [84] above:

(a) Part of *Yandarniyirra Wundu* (the Fortescue River) is within the proposed licence area. The whole of *Yandarniyirra Wundu* and other *wundu* (watercourses) and *Jinbi* (springs) throughout Yindjibarndi country are said to be of 'great significance' to Yindjibarndi People. So much can be accepted. However, I agree with the Government party's contention that an 'area or site of particular significance' must have a quality which means it 'clearly stands out in some way from the general background of other sites and the country as a whole'. To put it another way, a distinction must be drawn between areas and sites which are **generally** culturally significant, and **specific** culturally significant areas and sites which are of **particular** significance to Yindjibarndi People: see, for example, *WF (Deceased) v Emergent Resources* at [39]. There is no basis provided for distinguishing the part of the river within the proposed licence area as being of particular significance as compared with the rest of the river.

(b) Some of the *Marnda* (hills) are within the proposed licence area but are too broadly described to be found to be of particular significance. As to the *Yamarrara* (caves) located within the hills, the evidence is too general, both as to the grounds for 'particular' significance and location, to allow me to make a finding of 'particular significance' in respect of the caves. So too with the *Marnda* which are said to be *Mawarn Thalu* (increase sites). As the Tribunal reaffirmed in *Barnes v AngloGold Ashanti Australia* at [49] (referring also to *WF (deceased) v Emergent* at [45]):

> in order to satisfy the requirements of s 237(b) of the NTA in relation to the question of whether sites of particular significance exist in the area, the onus is on the native title party to produce some concrete evidence relating to the particular site, its locations and the grounds for its particular significance

(c) There is evidence of 'at least 150 *Gurdi* sites' in the proposed licence area and reference is made to several *Gurdi* or pebble mouse mounds registered with DIA as ethnographic sites, which are not on the proposed licence area. The inference that can be drawn is that the *Gurdi* are not confined to the

proposed licence area, but are to be found elsewhere on Yindjibarndi country. The question then becomes whether all, or any, of the *Gurdi* sites in the proposed licence area are sites of particular significance. The evidence is deficient in this respect. Whilst the significance of the pebble mouse, and its importance to the Yindjibarndi, is addressed in the evidence, its relationship with, and the significance of, the *Gurdi* (pebble mouse mound) is not. This is not a trite distinction to draw. In order to assess the site for the purposes of s 237(b), there needs to be evidence about the *Gurdi* **sites** and the importance of the **sites** to the Yindjibarndi. Nor is there any basis in the evidence for a finding of 'particular' significance; that is, there is no evidence as to why these particular *Gurdi,* or some of them, are of **particular** cultural significance to Yindjibarndi rather than being **generally** culturally significant.

(d) It is not clear from the evidence whether the two separate hunting grounds, *Thurwanha Ngurra* and *Gulyin* are within the proposed licence area, but even if they were, the description is too general to allow a finding of particular significance of these areas.

(e) It is not clear whether the *Yamararra* (caves) containing *Budbungarli* (artefacts) and grinding stones are the same as the *Yamararra* referred to in paragraph [130](b) above, but again , the evidence is too general to allow me to make a finding of 'particular significance' in respect of these caves.

(f) It is not clear whether the *Marningarli* (engraving) referred to is within the proposed licence area, but in any event, the mere reference to such a site is insufficient for a finding of particular significance.

(g) The evidence does not disclose whether *Garngamninha Wundu*, described as a 'highly religious site for Yindjibarndi', is within the proposed licence area. By its description, it is a watercourse with a number of permanent rock pools and camp spots. Even if it could be established as traversing the proposed licence area, in my view it falls within the same category as *Yandarniyirra Wundu* (the Fortescue River), discussed at paragraph [130] above. Even if part of the watercourse, with its rock pools and camp spots, is within the proposed licence area, there is no basis provided for distinguishing the any

part of the watercourse within the proposed licence area as being of particular significance.

(h) *Garngambinha* is a watercourse said to be in the proposed licence area. Reference is made generally to camping in the area. This is not a sufficient basis for a finding that it is an area or site of particular significance.

(i) *Buthunha* (Hooley Creek) is also a watercourse said to be of high religious significance for Yindjibarndi People, but again it is not clear whether any of the watercourse falls within the proposed licence area. As with *Yandarniyirra Wundu* (the Fortescue River), discussed at paragraph [130] above, and *Garngamninha Wundu*, discussed at paragraph [130] above, there is no basis provided for distinguishing the any part of the watercourse, even if within the proposed licence area as being of particular significance.

[131] Even if the evidence had disclosed relevant areas or sites of particular significance, I note that the grantee party will be conducting exploration, rather than mining activities, on the land. I accept that exploration activities of their nature are relatively low impact. That consideration, together with the grantee party's approach to cultural heritage matters, outlined at paragraphs [97] to [98] above, the restrictions to be imposed by the proposed endorsements and conditions and the regulatory regime, as well as the lack of relevant information from the native title party as to how interference might arise in respect of any area or site (see paragraph [101] above), leads me to the conclusion that the grant of the proposed licence is not likely to interfere with areas and sites of particular significance, in accordance with the traditions of the Yindjibarndi People, in any event.

Major disturbance to land or waters – s 237(c)

Evidence and contentions submitted

[132] The native title party's contentions in relation to 'major disturbance to any land or waters concerned', made in accordance with the affidavit evidence of Mr Woodley and Dr Rijavec are that the grant of the proposed licence or the exercise of the rights will:

(a) prevent the full enjoyment of Mr Woodley and other Yindjibarndi people to 'freely manifest their religious beliefs through the observance, practice and

teaching of particular religious rituals and ceremonies, in the land and waters of the proposed tenement...' (NTP contentions, at paragraph 113);

(b) prevent the exercise of the right of Mr Woodley and other Yindjibarndi people to 'enjoy their own culture and profess and practice their own religion, in respect of the land and water of the proposed tenement...';

(c) delay the projected timeline to complete the cultural mapping of the whole of Yindjibarndi;

(d) make impossible the collection of cultural information for Juluwarlu in areas where ministerial consent under s 18 has been given;

(e) progressively remove possession of the cultural and intellectual property of the Yindjibarndi People; and

(f) deliver to the exclusive possession of the grantee party and its heritage consultants such 'Yindjibarndi cultural information, if any, that has been obtained from areas where Grantee Party and Wirlu-Murra have conducted heritage surveys'.

[133] Again, the contentions are focussed on damage caused to the Yindjibarndi People by the lack of agreement between the native title party and the grantee party regarding the exercise of rights authorised by the proposed licence.

[134] The native title party contends that the term 'disturbance' is ambiguous and argues that resort should be had to international instruments in its construction for the purposes of s 237(c) of the Act. It is said that the grant of the proposed licence 'without a negotiated agreement with the Native Title Party will prevent the exercise of fundamental human rights, and in accordance with the religious beliefs of the Yindjibarndi People, will cause Yindjibarndi People to suffer' (NTP Contentions at paragraph 119).

[135] The Government party does not accept that the term 'disturbance' lacks clarity such that it is necessary to take into account international instruments in its construction, referring to the Full Federal Court's decision in *Cheedy v Western Australia* at [105]-[109]. In its submission, s 237(c) requires the likelihood of a 'significant, direct physical disturbance of land and waters' (Government party contentions at paragraph 96).

[136] The grantee party also contests the relevance of the native title party's contentions on the basis that they did not address that disturbance must be direct significant physical disturbance to the relevant area (citing *Cosmos v Croydon Gold* (see [29]) and, in relation to physical disturbance, *Goonack v Geotech International* at [44]).

[137] The grantee party contends that major disturbance to land or waters is not likely to occur due to the following:

(a) the State's legislative regime governs the exercise of rights conferred by the granting of exploration licences and the grantee party's compliance is presumed;

(b) the endorsements and conditions intended to be imposed by the Government party would apply to the proposed licence, including the requirement for rehabilitation;

(c) disturbance beyond that which has already occurred is not expected due to the fact that a pastoral lease covers a large portion of the 'affected area' (i.e. a specific portion within the proposed licence) (referring to paragraph 137 of Mr Woodley's affidavit, detailing prior disturbance to flora, fauna and water sources); and

(d) the absence of sensitive topographical, geological or environmental factors within the affected area.

[138] The Government party's contentions are similar in relation to (a)-(c) of the preceding paragraph, noting also the prior mineral exploration within the proposed licence area and the lack of particular characteristics that would make major disturbance likely.

Consideration of s 237(c)

[139] It is apparent that the native title party's contentions and evidence do not focus upon the relevant criteria in s 237(c) of 'major disturbance to any land or waters concerned'. Rather they focus on 'disturbance' to religious, cultural and other activities of Mr Woodley

and other Yindjibarndi people. This is not the relevant criteria to be considered under s 237(c).

[140] The native title party does not identify any ambiguity in the construction of s 237(c) of the Act. As explained in *Cheedy v Western Australia* at [107] in respect of the construction of ss 38 and 39 of the Act, it is only if there is more than one possible meaning of the provision that the canon of construction favouring Australia's international obligations has any work to do. In my view, the word 'disturbance' used in s 237(c) does not lack clarity requiring the resort to international instruments in its construction. As to the construction of the phrase 'major disturbance' in s 237(c), I repeat [21](c) above:

> The term 'major disturbance' is to be given its ordinary English 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 (*Oriole Resources* at [52]-[54], referring to *Dann v Western Australia* at 395, 401 and 413).

[141] Whilst cultural concerns are relevant matters for the Tribunal in considering whether there is likely to be 'major disturbance' to land or waters, they cannot, on their own, form the basis of a finding of major disturbance; see *Cosmos v Croydon Gold* at [29] referring to *Goonack v Geotech International* at [44].

[142] There is very little or no material before the Tribunal as to what activities there might be on the land or waters which would be likely to involve a major disturbance to land or waters in the proposed licence area.

[143] In the main, the Tribunal has held that exploration activity pursuant to the grant or other rights created does not cause major disturbance to land or waters, but there have been exceptions; see cases referred to in *Champion v Western Australia* at [77]. I am unable to find that this case falls into the category of exceptions.

[144] I have had close regard to the material before me, including those matters referred to in [137] above. I have considered the grantee party's proposed 2004 exploration program, and allowed for the possibility that this may not detail the full extent of the activities which the grantee party might undertake, if the licence is granted. I have taken into account the cultural beliefs and concerns of the native title party, and the contentions as summarised in [132] above.

[145] Having taken into account all of these matters, I am unable to find that the act is likely to involve major disturbance to any land or waters concerned, or create rights whose exercise is likely to do so.

Determination

[146] The determination of the Tribunal is that the grant of exploration licence E47/1397 to FMG Pilbara Pty Ltd is an act attracting the expedited procedure.

President Raelene Webb QC
Member
17 January 2014