NATIONAL NATIVE TITLE TRIBUNAL

Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) RNTBC and Others v FMG Pilbara Pty Ltd and Another **[2015] NNTTA 4 (4 February 2015)**

Application Nos: **WO2013/1099, WO2013/1100, WO2013/1101, WO2013/1102, WO2013/1107, WO2013/1108, WO2013/1109**

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

- and -

IN THE MATTER of an inquiry into expedited procedure objection applications

Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) RNTBC (first native title party)

- and -

Billy Atkins and Others on behalf of Gingirana (WC2006/002) (second native title party)

- and -

Tarlka Matuwa Piarku Aboriginal Corporation RNTBC (third native title party)

- and -

FMG Pilbara Pty Ltd (grantee party)

- and -

The State of Western Australia (Government party)

DETERMINATION THAT ACTS ARE NOT ACTS ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Mr JR McNamara, Member
Place: Brisbane
Date: 4 February 2015

Catchwords: Native title – future acts – proposed grant of exploration licences – expedited procedure objection applications – video evidence – gender-restricted evidence – non-disclosure directions – failure to annex maps referred to in affidavits – relevance of grantee party's intentions – whether acts are likely to interfere directly with the carrying on of community or social activities – whether interference involves objective and subjective

elements – Tribunal must have regard to nature of the activity – whether acts are likely to interfere with sites of particular significance – adoption of previous findings of the Tribunal – whether interference determined by reference to traditions of the native title party – whether interference must be physical – whether an area or site must have physical form – area or site must be capable of definition by reference to geospatial criteria – whether acts are likely to involve major disturbance to land or waters – area of environmental and cultural significance – expedited procedure not attracted

Legislation:

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

Mining Act 1978 (WA), s 58(1)(b)

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

Cases:

BP (deceased) and Others on behalf of the Birriliburu People v Western Australia [2008] FCA 944 (‘*BP v Western Australia*’)

BW (deceased) and Others on behalf of Bunuba/Western Australia/Callum Baxter [2012] NNTTA 32 (‘*BW v Baxter*’)

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

Barbara Sturt and Others on behalf of the Jaru Native Title Claimants v Baracus Pty Ltd [2014] NNTTA 32 (‘*Sturt v Baracus*’)

Briginshaw v Briginshaw [1938] HCA 34; (1998) 60 CLR 336 (‘*Briginshaw v Briginshaw*’)

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*’)

Cadbury UK Ltd v Registrar of Trade Marks (2008) 107 ALD 316; [2008] FCA 1126 (‘*Cadbury UK v Registrar of Trade Marks*’)

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

Cheinmora v Heron Resources Ltd (2005) 196 FLR 250; [2005] NNTTA 99 (‘*Cheinmora v Heron Resources*’)

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

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

Cyril Barnes and Others on behalf of Central East Goldfields People/Western Australia/Copley Pty Ltd [2012] NNTTA 109 (‘*Barnes v Copley*’)

Cyril Barnes and Others on behalf of Central East Goldfields People/Western Australia/Karl Christian Pirkopf [2012] NNTTA 50 (‘*Barnes v Pirkopf*’)

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

Drury v Western Australia (2002) 170 FLR 182; [2002] NNTTA 171 (‘*Drury v Western Australia*’)

FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation RNTBC [2014] FCA 1335 (‘*FMG Pilbara v Yindjibarndi Aboriginal Corporation*’)

George Huddleston, Lenny Liddle, Paddy Huddleston, Tony Kenyon, Robert Patrick Markham and Gabriel Hazelbane/Northern Territory/Stephen Darryl Moffatt [2002] NNTTA 16 (‘*Huddleston v Moffatt*’)

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

Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (‘*Kanak v National Native Title Tribunal*’)

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

Kevin Peter Walley on behalf of the Ngoonooru Wadjari People/Western Australia/Allan Brosnan [2001] NNTTA 78 (‘*Walley v Brosnan*’)

Leonne Velickovic/Western Australia/Glen Allen Sinclair [2001] NNTTA 14 (‘*Velickovic v Sinclair*’)

Leonne Velickovic on behalf of Widji People/Westex Resources Pty Ltd/Western Australia [2004] NNTTA 13 (‘*Velickovic v Westex Resources*’)

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

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

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

Mark Lockyer & Ors (Kuruma Marthudunera)/Western Australia/Mineraology Pty Ltd [2006] NNTTA 133 (‘*Lockyer v Mineralogy*’)

McDonald v Director-General of Social Security (1984) 1 FCR 354; [1984] FCA 57 (‘*McDonald v Director-General of Social Security*’)

Merle Forrest and Others on behalf of Central East Goldfields People/Western Australia/Aruma Exploration Pty Ltd [2012] NNTTA 59 (‘*Forrest v Aruma Exploration*’)

Mt Gingee Munjie Resources Pty Ltd v Victoria (2003) 182 FLR 375; [2003] NNTTA 125 (‘*Mt Gingee Munjie Resources v Victoria*’)

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

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 110 ALR 449 (‘*Neat Holdings v Karajan Holdings*’)

Re a Solicitor [1993] QB 69 (‘*Re a Solicitor*’)

Re Nyungah People (1996) 132 FLR 54; [1996] NNTTA 18 (‘*Re Nyungah People*’)

Re Smith (1995) 128 FLR 300; [1995] NNTTA 31 (‘*Re Smith*’)

Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd [2003] NNTTA 62 (‘*Boddington v Bacome*’)

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

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

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

Strategic Minerals Corporation Nl/Allan Kynuna, Darren Kynuna, John Keyes, Lavin Keyes, Lawrence Keyes, Malcolm Keyes, Helen Smith on behalf of the Woolgar Group/Queensland [2003] NNTTA 83 (‘*Strategic Minerals Corporation v Kynuna*’)

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

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

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

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

Western Australia/Glen Griffin Venn Money/Jack Britten & Ors [2011] NNTTA 53 (‘*Western Australia v Britten*’)

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

WF (deceased) and Others on behalf of Wiluna v Tropical Resources Pty Ltd and Another [2014] NNTTA 104 (‘*WF v Tropical Resources*’)

WF (deceased) and Others on behalf of Wiluna v Great Western Exploration Ltd and Another [2014] NNTTA 107 (‘*WF v Great Western Exploration*’)

WF (deceased) and others on behalf of the Wiluna Native Title Claimants/Mungarlu Ngurrarankatja Rirraunkaja Aboriginal Corporation/Western Australia/Marford Group Pty Ltd [2012] NNTTA 115 (‘*WF v Marford Group*’)

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

WF (deceased) & Others on behalf of the Wiluna Native Title Claimants/Western Australia/Kingx Pty Ltd [2011] NNTTA 170 (‘*WF v Kingx*’)

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

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 RNTBC v FMG Pilbara Pty Ltd and Another [2014] NNTTA 8 (‘*Yindjibarndi Aboriginal Corporation v FMG Pilbara 1*’)

Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd and Another [2014] NNTTA 14 (‘*Yindjibarndi Aboriginal Corporation v FMG Pilbara 2*’)

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

Representatives of the native title parties:	Mr Malcolm O’Dell, Central Desert Native Title Services Limited Mr Michael Allbrook, Central Desert Native Title Services Limited Ms Irene Assumpter Akumu, Central Desert Native Title Services Limited
Representatives of the Government party:	Mr John Carroll, State Solicitor’s Office Mr Matthew Smith, Department of Mines and Petroleum
Representative of the grantee party:	Mr Ken Green, Green Legal

REASONS FOR DETERMINATION

[1] On 1 July 2013, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licences E69/2722, E69/2726 and E69/2727 ('the proposed licences') to FMG Pilbara Pty Ltd ('the grantee party'). The notice included a statement that the Government party considers the grants to be acts attracting the expedited procedure (that is, that the proposed licences are acts that can be done without the normal negotiations required by s 31 of the Act). In accordance with s 29(4)(a) of the Act, the notice specifies the 'notification day' as 3 July 2013.

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

- E69/2722 – 83 graticular blocks (approximately 232 square kilometres), 161 kilometres northerly of Wiluna in the Shire of Wiluna.
- E69/2726 – 66 graticular blocks (approximately 185 square kilometres), 140 kilometres northerly of Wiluna in the Shire of Wiluna.
- E69/2727 – 59 graticular blocks (approximately 165 square kilometres), 139 kilometres northerly of Wiluna in the Shire of Wiluna.

[3] Each of the proposed licences encroaches on land and waters which are the subject of a determination of native title (see *BP v Western Australia*). Pursuant to the determination, Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) RNTBC ('the first native title party') holds exclusive native title rights and interests in the area on trust for the Birriliburu native title holders. In addition to the determination area, E69/2722 also encroaches on the Gingirana native title claim (WC2006/002 – registered from 13 April 2006). E69/2726 also encroaches on the Wiluna native title claim (WC1999/024 – registered from 24 September 1999) and E69/2727 encroaches on both the Gingirana and Wiluna claims. I note that a determination of native title was made in the Federal Court on 29 July 2013 in respect of the Wiluna claim (see *WF v Western Australia*) and Tarlka Matuwa Piarku Aboriginal Corporation was subsequently registered as the prescribed body corporate on 27 January 2015.

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

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

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

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

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

[5] On 1 November 2013, the first native title party filed objections with the Tribunal in relation to each of the proposed licences. Objections were also received from the persons comprising the applicant in the Gingirana claim ('the second native title party') in relation to E69/2722 and E69/2726 and from the persons comprising the applicant in the Wiluna claim in relation to E69/2726 and E69/2727. Following its nomination as the prescribed body corporate, the native title rights and interests of the Wiluna common law holders are now held in trust by Tarlka Matuwa Piarku Aboriginal Corporation RNTBC ('the third native title party').

[6] Preliminary conferences were held in each of the matters on 3 December 2013. At the preliminary conferences, representatives for the grantee party informed the Tribunal that it was willing to negotiate with the first and second native title parties, and had been involved in discussions with the third native title party around the proposed licences and other matters. The matters were therefore adjourned to a status conference on 9 April 2014. At the status conference, the grantee party representative indicated it was still negotiating with the third native title party, and the matter was programmed for inquiry. In relation to the objections made by the first native title party, the grantee party representative asked that the matters proceed to inquiry and

the matter was programmed accordingly. In relation to the objections made by the second native title party, the matter was adjourned to a further status conference to allow for further negotiation. When the matters were reconvened on 7 May 2014, the grantee party requested that they also proceed to inquiry and directions were subsequently issued by Member Shurven, who had been appointed to conduct the inquiry.

[7] In compliance with the directions, the Government party provided supporting documentary evidence on 29 April 2014. On 21 May 2014, a representative for the first native title party contacted the Tribunal by email indicating its intention to seek directions pursuant to s 155 of the Act for the non-disclosure of culturally sensitive information it intended to produce in support of the objection. The email also requested the appointment of a male Tribunal member to conduct the inquiry, given the gender-restricted nature of the information. Consequently, I was appointed by President Webb QC to hear and determine the objections on 29 May 2014.

[8] The native title parties provided statements of contentions on 18 June 2014 (the first native title party filed a further, amended statement of contentions on 19 June 2014). These documents were accompanied by a proposed minute of non-disclosure directions relating to several documents intended to be filed by the first native title party. On the basis of the proposed minute, the Tribunal issued interim directions on 27 June 2014 for the purpose of enabling parties to view the material and make submissions on the proposed directions. After receiving submissions from parties, I determined that non-disclosure directions should be made.

[9] Given the delay occasioned by the need to resolve the non-disclosure issue, I allowed an extension to the directions for inquiry on 28 July 2014. In compliance with the amended directions, the grantee party filed a statement of contentions on 28 August 2014, together with the affidavit of Thomas James Weaver affirmed 28 August 2014, and the Government party provided its statement of contentions on 3 September 2014. The first native title party filed a statement of contentions in reply on 24 September 2014, accompanied by the affidavit of Irene Assumpter Akumu affirmed 24 September 2014.

[10] I have considered the material provided to the Tribunal in relation to the objections and I am satisfied that it is appropriate to deal with these matters 'on the papers' (that is, without a formal hearing) pursuant to s 151(2) of the Act.

Legal principles

[11] Section 237 of the Act provides:

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

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

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

Act') has since been amended and the standard conditions imposed on exploration licences have been strengthened (see *Tullock v Western Australia* at [10]-[12]).

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

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

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

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

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

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

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

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

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

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

- The interference contemplated by s 237(b) must be evaluated in the context of the particular area or site and the laws and customs in relation to that area or site (see *FMG Pilbara v Yindjibarndi Aboriginal Corporation* at [79]; *Silver v Northern Territory* at [88]).

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

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

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

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

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

- The term 'major disturbance' is to be given its ordinary meaning as understood by the whole Australian community, including Aboriginal people. The concerns of the Aboriginal community, including matters such as community life, customs, traditions and cultural concerns are relevant matters

for consideration in evaluating the disturbance (see *Little v Oriole Resources* at [52]-[54]; *Dann v Western Australia* at 395, 401 and 413).

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

The Proposed Future Acts

[18] The Government party provides the following documents in relation to the proposed licences:

- Tengraph plans with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity of the proposed licence.

- Reports and plans from the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs ('DAA Database'), including sites listed on the Register of Aboriginal Sites.

- Copies of the tenement applications and Draft Tenement Endorsements and Conditions Extracts.

- The instruments of licence and first schedules listing land included and excluded from the grants.

- Tengraph quick appraisals detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features within the proposed licences.

E69/2722

[19] The Tengraph quick appraisal establishes that the underlying tenure of the land within E69/2722 is vacant Crown land. The quick appraisal also notes that the area is also subject to the following designations:

- Proposed Conservation Park (PCP/153) overlapping at 100 per cent.

- Proclaimed Ground Water Area (GWA/15, East Murchison) overlapping at 100 per cent.

- Two National Estate Registered Sites (NER/9895 and NER/9897) overlapping at 100 per cent and less than 0.1 per cent respectively.

- One Aboriginal Heritage Area (AHA/52) overlapping at less than 0.1 per cent.

[20] The quick appraisal indicates that the area within E69/2722 has previously been subject to eight exploration licences granted between 1988 and 1997, overlapping the area at between 55.1 per cent and less than 0.1 per cent, with an average lifespan of four years and eight months. The area has also been subject to four temporary reserves granted between 1959 and 1980, overlapping between 4.6 per cent and 39.1 per cent, with an average lifespan of one year and 11 months.

[21] The quick appraisal also notes there are seven tracks and 41 minor non-perennial watercourses in the area of E69/2722.

[22] The report from the DAA Database establishes the existence of two sites registered under the AHA, the boundaries of which encroach on E69/2722:

- Site ID 1183: Talbot Rockhole – painting, engraving, water source.

- Site ID 1184: Stone Markers – man-made structure, artefacts/scatter, water source.

[23] In addition to the registered sites, the DAA Database also records one ‘other heritage place’ within E69/2722:

- Site ID 2558: Katjara – lodged – artefacts/scatter, ceremonial, engraving, mythological, painting.

E69/2726

[24] The Tengraph quick appraisal establishes that the underlying tenure of the land within E69/2726 is as follows:

- Two parcels of vacant Crown land overlapping at 23.8 per cent and 70.8 per cent.
- Pastoral lease 3114/654 (Granite Peak) overlapping at 4.3 per cent.
- Crown reserve 40930 (use and benefit of Aboriginal inhabitants) overlapping at one per cent.
- Historical lease 395/405 overlapping at 5.9 per cent

[25] The quick appraisal also notes that the area is also subject to the following designations:

- Proposed Conservation Park (PCP/153) overlapping at 23.8 per cent.
- Proclaimed Ground Water Area (GWA/15, East Murchison) overlapping at 100 per cent.
- National Estate Registered Site NER/9895 overlapping at 19 per cent.

[26] The quick appraisal indicates that the area within E69/2726 has previously been subject to eight exploration licences granted between 1988 and 2008, overlapping the area at between 0.2 per cent and 100 per cent, with an average lifespan of one year and two months. The area has also been subject to two temporary reserves granted in 1959 and 1978, overlapping at 100 per cent and 3.8 per cent respectively, the first being cancelled after five years and the second after 18 months.

[27] The quick appraisal also notes there are seven tracks, one building (Blue Hills) and 17 minor non-perennial watercourses in the area of E69/2726.

[28] The report from the DAA Database establishes the existence of three registered sites within E69/2726:

- Site ID 1182: Carnarvon Range – painting.
- Site ID 1185: Carnarvon Range Camp – artefacts/scatter, camp.
- Site ID 2560: Charralang/Tjarralang – man-made structure, modified tree, quarry, artefacts/scatter.

[29] In addition to the registered sites, the DAA Database also record one ‘other heritage place’ within E69/2726:

- Site ID 3056: Kanatukul – lodged – artefacts/scatter, ceremonial, engraving, man-made structure, mythological, painting.

E69/2727

[30] The Tengraph quick appraisal establishes that the underlying tenure of the land within E69/2727 is as follows:

- Two parcels of vacant Crown land overlapping at 61.1 per cent and 10 per cent.
- Pastoral lease 3114/654 (Granite Peak) overlapping at 4.2 per cent.
- Unnumbered Land Act Reserve (UNN 1001) overlapping at 23.7 per cent.
- Crown reserve 40930 (use and benefit of Aboriginal inhabitants) overlapping at one per cent.
- Historical lease 395/405 overlapping at 4.7 per cent.

[31] The quick appraisal also notes that the area is subject to the following designations:

- Proposed Conservation Park (PCP/153) overlapping at 3.2 per cent.
- Proclaimed Ground Water Area (GWA/15, East Murchison) overlapping at 100 per cent.
- National Estate Registered Site NER/9895 overlapping at 4.1 per cent.

[32] The quick appraisal indicates that the area within E69/2727 has previously been subject to seven exploration licences granted between 1991 and 2008, overlapping the area at between 0.2 per cent and 100 per cent, with an average lifespan of one year and ten months. The area has also been subject to two temporary reserves granted in 1959 and 1977, overlapping at 100 per cent and 12.9 per cent respectively, the first being cancelled after five years and the second after 15 months.

[33] The quick appraisal also notes the following features within the area of E69/2727: one geodetic survey station (SSM-FX58), fifteen tracks, two fence lines, two yards, one well/bore with windmill (Well 5) and 54 minor non-perennial watercourses.

[34] The report from the DAA Database indicates there are no registered sites and no 'other heritage places' within E69/2727.

Conditions and Endorsements

[35] The Draft Tenement Endorsement and Conditions Extracts indicate that the proposed licences will be subject to the standard four conditions imposed on the grant of all exploration and prospecting licences in Western Australia (se*e Tullock v Western Australia* at [11]-[12]). The following further conditions will be imposed on the proposed licences in respect of the area designated as the proposed conservation park:

> **In respect to the area of land designated PCP/153 in TENGRAPH, hereinafter referred to as the designated area, the following additional conditions shall apply:**
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> 5. Prior to accessing the licence area, the licensee shall consult with the Environmental Officer, DMP, and ensure that where required all vehicles and equipment entering the designated area are washed down to remove soil and plant propagules and adhering to such conditions specified for the prevention of the spread of soil-borne diseases.
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> 6. Prior to any activity involving disturbance to vegetation and soils including:-
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> - exploration access; and/or
> - exploration sampling;
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> the licensee preparing a detailed program for each phase of the proposed exploration for written approval of the Director, Environment, DMP. The Director, Environment, DMP to consult with the Regional/District Manager, Department of Environment and Conservation or other government agency (as relevant) prior to approval. This program to describe the environmental impacts and programs for their management and is to include:-
>
> - maps and/or aerial photographs showing the proposed locations of all ground activities and disturbances;
> - the purpose, specifications and extent of each activity and disturbance;
> - descriptions of all vegetation types (in general terms), land forms, and usual features likely to be disturbed by such proposed disturbances;
> - details on proposals that may disturb sensitive terrestrial habitats including any declared rare flora and fauna if applicable;
> - procedures to protect the integrity of special ecosystems such as wetland systems, mangal communities and rainforests areas [*sic*] (and/or associated rainforest monitoring sites) if applicable;
> - techniques, prescriptions, and timetable for rehabilitation of all proposed disturbances;
> - undertaking for corrective measures for failed rehabilitation;

- details of water requirements from within the designated area;
- details of refuse disposal; and
- proposals for instruction and supervision of personnel and contractors in respect to environmental conditions.

7. Access to and from and the movement of vehicles within the licence area being restricted to ground or seasonal conditions and routes approved under the program or otherwise agreed by the Environmental Officer, DMP.

8. At agreed intervals, not greater than 12 monthly, the licensee providing a brief report to the Director, Environment, DMP outlining the progress of the operation and rehabilitation and the proposed operations and rehabilitation programs for the next 12 months.

9. Prior to the cessation of the exploration/prospecting activity in the designated area, the licensee notifying the Environmental Officer, DMP and arranging an inspection as required.

[36] The following further conditions will also be imposed:

E69/2726

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

6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-

   - the grant of the Licence; or
   - registration of a transfer introducing a new Licensee;

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

7. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Use and Benefit of Aboriginal Inhabitaants [*sic*] Reserve 40930.

E69/2727

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

6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-

   - The grant of the Licence; or
   - registration of a transfer introducing a new Licensee;

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

7. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Use and Benefit of Aboriginal Inhabitaants [*sic*] Reserve 40930.

8. No exploration activities being carried out on Stock Route Reserve UNN 1014 which restrict the use of the reserve.

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

1. The Licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder;

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

Relevance of previous mining and pastoral interests

[38] The Government party seeks to rely on the existence of prior mineral exploration and pastoral interests in support of its contention that the proposed licences are not likely to interfere with community and social activities or with areas or sites of particular significance. In particular, the Government party contends that the activities contemplated by the grantee party are likely to be the same as, or no more significant than, the previous and existing use of the areas.

[39] The extent of previous mineral exploration in the proposed licence areas is outlined above at [19], [24] and [30]. Based on the documents provided by the Government party, it is apparent that each of the proposed licence areas has been subject to several exploration licences over the previous 25 years. However, in the case of the areas subject to E69/2726 and E69/2727, it appears there have been no active exploration interests since 2008, and in the case of E69/2722, there have been no active exploration interests since 1997. The information provided by the Government party in relation to E69/2726 and E69/2727 suggests that the previous licences were of limited duration. The documents also indicate that the proposed licence areas were subject to various temporary reserves granted prior to the enactment of the *Mining Act*, the last of which was cancelled in 1980. In relation to pastoral interests, Government party documents indicate that the Granite Peak pastoral lease currently

overlaps approximately four per cent of E69/2726 and E69/2727. I note that these areas have also been subject to a historical lease.

[40] The first native title party contends that the grant of exploration tenure does not necessarily result in exploration activity and says the Government party has failed to provide any evidence that activity has actually occurred pursuant to the granted licences and temporary reserves. In relation to the Granite Peak pastoral lease, the first native title party also notes that it does not affect those parts of the proposed licences areas which fall within the Birriliburu determination area. Furthermore, the first native title party states that the Government party has provided no evidence as to the nature of the activities conducted pursuant to the Granite Peak pastoral lease or the historical lease and has failed to detail on what basis the activities permitted by a pastoral lease may be compared to activities authorised by an exploration licence (NTP Reply, paragraphs 4.2-4.4).

[41] I accept the first native title party's submission that the grant of exploration tenure does not necessarily imply that exploration has taken place. There may be a variety of reasons why the rights conferred by a particular grant were not actually exercised. An exploration licence authorises the holder to carry out a range of activities involving varying degrees of disturbance, and it does not necessarily follow from the grant of such a licence that the explorer has run through the entire gamut of activities authorised by the grant. There may be circumstances where it is appropriate to infer that exploration has actually occurred (for instance, where an exploration licence has existed for a number of years). However, that does not necessarily assist the Tribunal to determine the extent of the activity (see *WF v Marford Group* at [59]). Furthermore, evidence that exploration has actually taken place may not support the conclusion that the proposed future act is unlikely to interfere with an area or site of particular significance, as the activity may not have affected the area or site to such a degree that further activity would not constitute interference (see *Forrest v Aruma Exploration* at [64]; *Barnes v Copley* at [42]; *Weld Range Metals v Western Australia* at [295]).

[42] The Tribunal has previously determined that the existence of mining or pastoral interests which may have affected or continue to affect the community or social activities of the native title party may be taken into account in evaluating the

likelihood that the proposed future act will further affect such activities so as to constitute direct interference with them (see *Walley v Western Australia* at [12], citing *Velickovic v Sinclair* at [13], *Huddleston v Moffatt* at [44]). This is an inference drawn from the nature of the interests involved and the likelihood that the lawful exercise of those interests will have constrained the community or social activities of the native title party. It is only one of several factors the Tribunal may have regard to in assessing the likelihood of interference. Although there may be no specific evidence as to the degree of interference, the Tribunal is entitled as part of the overall context to have regard to the fact that the exercise of those interests will already have to some extent interfered with the native title party's community or social activities (see *Tullock v Western Australia* at [121]-[122]). However, that does not necessarily lead to the conclusion that the effect of the proposed future act will be no more substantial than the previous or existing interests. Indeed, if the evidence suggests those interests have had limited effect on the native title party's community or social activities, they are unlikely to be given much weight in terms of that overall assessment.

Native Title Party Evidence

[43] Each of the native title parties provided a statement of contentions in support of its respective objections. However, the second and third native title parties say they have had the benefit of reading the statement of contentions filed by the first native title party and support and adopt those submissions.

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

- Affidavit of Frankie Wongawol affirmed 7 June 2014 ('FW Affidavit'). Mr Wongawol states that he is a Martu elder, a *wati* (initiated man) and one of the most senior men for the area of the Birriliburu native title determination. Mr Wongawol deposes that he has authority to speak for the area of the proposed licences as a *wati*. He also states that the proposed licences are located in his *ngurra* (home, country). I accept that Mr Wongawol has authority to speak about the area on behalf of the first native title party.

- Affidavit of Lena Long affirmed 6 June 2014 ('LL Affidavit'). Ms Long states that she is a native title holder and traditional owner for Birriliburu country. Ms Long also states that she was a director of the first native title party

between December 2009 and October 2011. I accept that Ms Long is authorised to give evidence on behalf of the first native title party.

- Affidavit of Darren Andrew Farmer affirmed 6 June 2014 ('DAF Affidavit'). Mr Farmer states that he is a native title holder and traditional owner for the Birriliburu determination. Mr Farmer also states that he is a *wati* and has previously been a director of the first native title party. I accept that Mr Farmer has authority to speak about the area on behalf of the first native title party.

- Affidavit of Robert Merlin Thomas affirmed 18 June 2014 ('RMT Affidavit'). Mr Thomas holds a Bachelor of Science (Environmental Science) and has been employed as general manager of the Land and Community Division of Central Desert Native Title Services Ltd ('CDNTS') since 24 August 2009. Mr Thomas states that he was previously employed with the Regional Management Planning Team at the Department of Conservation and Land Management ('CALM') in the early 1990s.

- Affidavit of Emma Georgina Drake affirmed 18 June 2014 ('EGD Affidavit'). Ms Drake holds a Bachelor of Arts (Natural Resource Education) and has been employed by CDNTS in the Land and Community Division since 25 March 2013, working in the role of 'Women's Ranger Coordinator'.

- Affidavit of Irene Assumpter Akumu affirmed 24 September 2014 ('IAA Affidavit). Ms Akumu is an employee of CDNTS and a representative for the native title parties. Ms Akumu deposes to communications between herself and representatives of the grantee party in relation to the proposed licences and the first native title party's preferred agreement.

[45] The first native title party also relies on evidence provided to the Tribunal by the first native title party in expedited procedure inquiry matters WO2011/0712 and WO2011/0713 (see *Mungarlu Ngurrarankatja Rirraunkaja v Zenith Minerals*):

- Affidavit of Miriam Atkins affirmed 26 October 2011 ('MA Affidavit'). Ms Atkins states that she is a Martu elder from the Putijarra mob and, at the time of making her affidavit, was also a director of the first native title party. I

accept that Ms Atkins has authority to give evidence on behalf of the first native title party.

- Affidavit of Jorna Farmer affirmed 27 October 2011 ('JF Affidavit'). Ms Farmer states that she is a native title holder and traditional owner for Birriliburu country and, at the time of making her affidavit, was a director of the first native title party. I accept that Ms Farmer is authorised to give evidence on behalf of the first native title party.

- Affidavit of Slim Williams affirmed 26 October 2011 ('SW Affidavit'). Mr Williams states that he is a native title holder and traditional owner for Birriliburu country and, at the time of making his affidavit, was also a director of the first native title party. Mr Williams states that he is an initiated man and the area in question is his grandfather's country. I accept that Mr Williams is authorised to give evidence on behalf of the first native title party.

- Affidavit of Robbie Wongawol affirmed 26 October 2011 ('RW Affidavit'). Mr Wongawol states that he is a traditional owner for the country in which the proposed licences are located and a Birriliburu native title holder. At the time of making his affidavit, Mr Wongawol was employed by CDNTS as a Land and Community Development Project Officer, and had previously been employed by CDNTS as a liaison officer and, subsequently, a head ranger. I accept that Mr Wongawol is authorised to speak about the country on behalf of the first native title party.

- Affidavit of Dr Lee Sackett affirmed 10 November 2011 ('LS Affidavit'). Dr Sackett holds a doctorate in Anthropology and has experience working with the Birriliburu native title holders, including as the author of the connection report for the Birriliburu native title claim.

- Affidavit of Lindsey George Langford affirmed 11 November 2011 ('LGL Affidavit'). Mr Langford holds a Bachelor of Arts (Anthropology) and, at the time of making his affidavit, was employed by CDNTS as 'Facilitator Land and Community Projects', having previously been engaged as

> ‘Anthropologist/Project Officer’ in respect of a number of native title claims and determinations, including Birriliburu.

[46] The materials provided to the Tribunal in WO2011/0712 and WO2011/0713 and relied on by the native title parties in the present matter include a digital versatile disc containing video evidence filmed at places in and around the Carnarvon Ranges. The video features members of the first native title party giving evidence to staff of CDNTS at specific locations, including Kanatukul and Katjarra.

[47] As noted above at [8], the first native title party requested that the Tribunal issue non-disclosure directions in relation to several documents, namely the affidavits of Mr Williams, Dr Sackett and Frankie Wongawol, and the video evidence. After considering parties’ submissions on the issue, I made directions requiring the documents to be used only for the purpose of these proceedings (including any appeal or judicial review proceedings) and to remain confidential to the officers and legal representatives of each party and their respective employees and consultants. In the case of the video evidence, the directions also required parties not to provide the material to anyone other than a person of the male gender.

[48] The Tribunal is obligated under s 162(2) of the Act to state in its determination any factual findings upon which it is based. Consistent with the non-disclosure directions, I have resisted a detailed discussion of the documents and have disclosed their contents only to the extent necessary to outline the findings of fact that form the basis of my decision. This not always a simple task, and it would have been of some assistance had the Tribunal been directed to the specific information that should not be disclosed according to the protocols of the first native title party.

[49] Several of the documents that are subject to the non-disclosure directions in this matter were subject to similar directions in WO2011/0712 and WO2011/0713. The affidavits of Robbie Wongawol and Mr Langford were also included in those directions, though no request was made to limit the disclosure of these documents in the present matter. It is not clear why non-disclosure directions were not sought in relation to these affidavits, as they deal with similar subject matter to the restricted evidence. Nevertheless, for the purpose of these reasons, I have dealt with the

affidavits of Robbie Wongawol and Mr Langford on the same basis as the restricted evidence.

Documents produced in previous inquiry

[50] The Government party notes that the video evidence and the affidavits of Ms Atkins, Ms Farmer, Mr Williams, Dr Sackett, Mr Langford and Robbie Wongawol were produced in relation to proceedings that involved different tenements and a different grantee party to the present proceedings and were produced two to three years ago. Consequently, the Government party submits that, to the extent the documents suggest that activities are carried on by the first native title party in the areas of the tenements considered in WO2011/0712 and WO2011/0713, the Tribunal ought not to accept that such activities presently occur in the proposed licence areas solely of the basis of that evidence. The Government party contends that the Tribunal should be careful when dealing with material prepared for the earlier proceedings and the onus is on the first native title party to establish the relevance of the material (GVP Contentions, paragraph 40).

[51] The first native title party contends that there is a clear spatial relationship between the tenements considered in WO2011/0712 and WO2011/0713 and, while the Tribunal is required to have regard to the particular grantee party involved in the proceedings, the evidence provided in relation to WO2011/0712 and WO2011/0713 is not directed towards the grantee party in those matters and has general applicability to the issues arising under s 237. The first native title party contends that there is nothing to suggest that the evidence relating to sites of particular significance has materially changed and, taken together with the documents produced for the purpose of the present inquiry, the evidence demonstrates a substantial increase in the conduct of community and social activities in the relevant areas (NTP Reply, paragraph 3.3).

[52] I accept that the documents produced in relation to the previous proceedings should not be relied on solely for the purposes of determining whether community or social activities are carried on by members of the first native title party in the proposed licence areas. As the Tribunal has recognised in previous decisions, evidence of past activity does not necessarily support an inference about contemporary activity or the likelihood of future activity. However, evidence of past activity may be relevant to the

extent that it demonstrates an ongoing pattern of activity, particularly in combination with evidence of contemporary activity. In this way, evidence which demonstrates that community or social activities were carried on in the past may support an inference drawn from contemporary evidence that the activities will continue to be carried on in the future.

[53] Though I accept that evidence of this nature must be treated with caution, I do not agree that the first native title party bears the onus of demonstrating the relevance of the material to the present inquiry. As McKerracher J recently affirmed in *FMG Pilbara v Yindibarndi Aboriginal Corporation* (at [79]), no party bears an evidential onus in these proceedings and the Tribunal is required to adopt the 'common sense approach' described by Carr J in *Ward v Western Australia*. There is clearly a significant overlap between the areas being considered in the present inquiry and the areas the subject of the previous proceedings (in particular, I note that the tenement considered in WO2011/0712 covers 60 per cent of the area affected by E69/2726 and 30 per cent of the area affected by E69/2727). I also note that the evidence is relevant to determining the significance of the broader area in which the proposed licences are situated. In the circumstances, I accept that the material produced for the purpose of WO2011/0712 and WO2011/0713 is relevant to these proceedings.

Anthropological evidence

[54] In *Mungarlu Ngurrarankatja Rirraunkaja v Zenith Minerals*, Member O'Dea made the following findings in relation to the affidavit of Mr Langford (at [34]):

> In relation to s 237(b), Mr Langford's affidavit is mostly concerned with reporting what members of the native title party have told him about sites in the area and only briefly deals with the ethnographic context in which those sites are considered significant. In this respect, I agree with the Government party's contention [that the primary evidence of Aboriginal witnesses should be preferred to the evidence of Mr Langford] and I have not given significant weight to this part of Mr Langford's evidence. Nevertheless, I have not taken the same approach to Mr Langford's evidence about the social and community activities of the native title party in the area. Mr Langford states that he has been employed by [CDNTS] as a land management facilitator and has spent 'considerable time' discussing caring for country activities with members of the native title party and has assisted the native title party with land management activities in the area (at para 7-11). While I agree with the Government party's contention that his training, study and experience does not qualify him to give evidence about the effect of the grantee party's exploration programme on those activities, Mr Langford's experience working with the native title holders places him in an appropriate position to give evidence about the nature of the social and community activities undertaken by the native title party. According [*sic*], I accept Mr Langford's evidence and have given it adequate weight.

[55] In the present matter, the Government party submits that, to the extent Mr Langford's affidavit is relevant to the present proceedings, the same approach should be taken in relation to s 237(b). In relation to s 237(a), the Government party argues there is no basis upon which the Tribunal can accept Mr Langford's evidence as evidence of any possible activities undertaken by the first native title party in the proposed licence areas at the present time. I have already dealt with that submission as it relates to Mr Langford's evidence about the community and social activities carried on by the first native title party. However, insofar as Mr Langford's evidence concerns matters relevant to s 237(b), I adopt the approach of Member O'Dea as outlined in the preceding paragraph.

[56] The Government party also contends that the affidavit of Dr Sackett contains little in the way of specific evidence regarding the proposed licences and is largely devoted to a theoretical discussion of the concept of *jukurrpa* and the intergenerational transfer of knowledge within the first native title party. In reply, the first native title party contends that Dr Sackett's affidavit provides anthropological and ethnographic context and was filed to assist the Tribunal in interpreting and understanding, among other matters, the nature of *jukurrpa* sites and why they hold particular significance for the native title party. I accept that Dr Sackett's evidence is relevant for the reasons outlined by the first native title party and I have given appropriate weight to it.

Failure to annex maps

[57] The Government party notes that the affidavits of Ms Atkins, Robbie Wongawol, Mr Langford and Mr Williams each state that the deponent was shown a topographical map of the tenements considered in WO2011/0712 and WO2011/0712 but fail to annex the relevant maps. The Government party contends that the absence of these maps makes it difficult for the parties and the Tribunal to ascertain the areas the deponent is discussing and whether the deponent is aware of the boundaries of the relevant tenements.

[58] In this regard, the Government party supports and relies on the grantee party's contentions in WO2013/0878 and WO2013/1103-1104, which concern similar omissions in affidavits filed in support of objections made by the third native title party with respect to other tenements applied for by the grantee party and a related

entity. Specifically, the grantee party submitted in WO2013/0878 and WO2013/1103-1104 that, because the affidavits fail to: annex the relevant maps; state any belief, or any basis for a belief, that the maps were correct; or state whether the deponents were shown the relevant maps days, weeks or months prior to swearing the affidavits, there is no basis to assume that any map viewed by the deponents correctly showed the location or extents of the relevant tenements or any other feature which might have been on the map or that the deponents knew the location or extent of those tenements.

[59] In particular, the grantee party relies on the following statement made by Member O'Dea in *WF v Emergent Resources* (at [24]):

> The Government party also sought to challenge the evidence of the Wiluna deponents on the basis that the map referred to in their evidence was not annexed to the affidavits. At para 10 of the Government party contentions dated 4 October 2011, the Government party contends that, apart from statements made in the affidavits asserting knowledge of the location of the proposed licence, there is no evidence that the deponents know its location and it is therefore unclear whether their claims concerning their knowledge of its location can or should be accepted. I agree that the native title party's failure to include a copy of the map, which was shown to the deponents during the course of the drafting of their affidavit, and would have provided me with considerable assistance in assessing the evidence contained in those affidavits is unhelpful. However, no such maps have been provided and I will assess the merits of the native title party's objection on the basis of the written affidavits alone.

[60] The grantee party endorses the approach adopted by Member O'Dea, but says that where a deponent has reviewed and referred to a map but has elected not to provide that map, then:

(1) if the deponent refers to a place which is unknown, as might be evidenced by its absence from the *Gazetteer of Australia*, then that reference has little probative value;

(2) if the deponent refers to a name, which is the name of multiple places in Western Australia, as might be evidenced by multiple listings entered on the *Gazetteer of Australia*, then that reference has little probative value; and

(3) it is not for parties, or the Tribunal, to speculate as to what, or where, the deponent might be referring to if there is any uncertainty in any locational reference by a deponent. Such matters are solely within the deponent's knowledge and, in accordance with the common sense approach to evidence,

where a party has had the opportunity, but has declined, to provide evidence, an adverse presumption should arise.

[61] I agree that the failure to annex any maps referred to by a deponent creates a degree of uncertainty about the deponent's knowledge of the location and extent of the area affected by the future act. However, the effect of such an omission on the weight given to the deponent's evidence will depend on the nature of the evidence provided. For instance, in the example given by the grantee party, a reference to a place that cannot be identified by reference to an authoritative source of placenames is likely to have little probative value if it is merely said to be within a particular part of the tenement. On the other hand, the evidence will likely have greater probative value if the place is identified by reference to a place which is known (for example, if the unknown place is said to be a certain distance from the known place). Similarly, if the place is listed on the Register of Aboriginal Sites, it may be open for the Tribunal to conclude that the place referred to by the deponent is the same place listed on the Register. However, if there remains any uncertainty as to the location of the site or the deponent's knowledge of the location and extent of the future act, a common sense approach would normally require the Tribunal to draw an adverse inference in respect of the party seeking to rely on the evidence.

[62] The first native title party notes that the evidence of Ms Atkins, Robbie Wongawol, Mr Langford and Mr Williams was accepted and given significant weight by the Tribunal in *Mungarlu Ngurrarankatja Rirraunkaja v Zenith Minerals*. The failure to annex the relevant maps was not raised in that matter and it was not specifically addressed by the Tribunal. As far as the Tribunal's findings on the significance of Kanatukul are concerned, the omission of the maps was of little consequence, as the site is listed on the DAA Database and could be identified by reference to a defined geographical feature (that is, the Carnarvon Ranges). However, it is clear from the Tribunal's reasons that little weight was given to statements that the tenements considered in that matter were located in a larger area known to the native title holders as Katjarra or the Carnarvon Ranges. Hence, Member O'Dea concluded (at [61]) that he was 'not satisfied that the evidence establishes that the Carnarvon Ranges' is an area or site of particular significance 'whether in the narrow geographic sense or in

the sense of the broader area suggested by the native title party.' Member O'Dea continued:

> Though I acknowledge that the Carnarvon Ranges are important to the native title holders for a variety of reasons, the evidence does not support a finding that the rangers constitute an area of particular significance to the native title party or what the boundaries of such an area would be.

[63] It is clear that Member O'Dea gave little weight to evidence that sought to situate the tenements within a broader area the boundaries of which had not been sufficiently defined. It is quite likely the failure to annex the relevant maps contributed to that assessment. In my view, that failure does affect the weight that can be given to the deponents' evidence as it relates to the dimensions or extent of the Katjarra/Carnarvon Ranges area. However, insofar as the evidence concerns locations that can be identified by reference to other materials, I do not consider the failure to annex the maps affects the weight of the evidence.

Grantee Party Evidence

[64] In support of its contentions, the grantee party relies on the affidavit of Mr Weaver. Mr Weaver is the Native Title Manager at Fortescue Metals Group Ltd ('Fortescue') and states that his duties include the management of all matters of concern to Fortescue and its wholly owned subsidiaries, including the grantee party, arising under the Act.

[65] Annexed to Mr Weaver's affidavit are: a Ground Disturbance Permit Procedure ('GDP Procedure') adopted by Fortescue and its subsidiaries (collectively, 'FMG Group'); Guidelines for the Management of Aboriginal Cultural Heritage produced by Fortescue's Heritage Unit in July 2013 ('Heritage Guidelines'); statements made by the grantee party pursuant to s 58(1)(b) of the *Mining Act* in relation to the proposed licences; and maps of the proposed licences produced by Fortescue.

[66] Mr Weaver attests that, under the GDP Procedure, FMG Group personnel and contractors are not permitted to disturb any area unless a Ground Disturbance Permit has been issued for the area. The issue of a Ground Disturbance Permit is dependent on a range of matters being satisfied, including in relation to Aboriginal heritage and environmental protection. Mr Weaver deposes that FMG Group endorses the principles set out in the *Guidelines for Consultation with Indigenous People by*

Mineral Explorers published by the Department of Mines and Petroleum ('DMP'), Tenure and Native Title Branch ('DMP Guidelines') and have adopted the Heritage Guidelines, which all FMG Group personnel and contractors are required to comply with. Mr Weaver states that it is the policy of FMG Group not to undertake ground disturbing activities without a heritage survey having first been undertaken (Weaver Affidavit, paragraphs 10-11, 18-19).

[67] Mr Weaver states that he is authorised by the grantee party to offer to enter into the RSHA with each native title party that has objected in respect of the proposed licences. Mr Weaver states that '[t]his offer may only be accepted by a qualifying Native Title Party by delivering two copies of the [RSHA] to the [grantee party], marked for my attention and otherwise signed by the Native Title Party prior to any determination by the Tribunal of the Native Title Party's objection in respect of those exploration licences' (Weaver Affidavit, paragraph 16)

Relevance of grantee party intentions and the presumption of regularity

[68] The first native title party acknowledges that evidence of a grantee party's intentions is relevant to the predictive assessment required under s 237 of the Act. However, the first native title party submits that evidence of intentions should be treated as such, and the Tribunal should take into account the fact that what actually happens in the future 'will turn on the vicissitudes associated with mineral exploration' (NTP Contentions, paragraph 6.13).

[69] The Government party submits that there is no basis to conclude that the grantee party will not act in accordance with its stated intentions (GVP Contentions, paragraph 28). The first native title party takes issue with this submission and says in reply that the Government party had not provided any evidence as to how it had reached this view (NTP Reply, paragraph 8.7).

[70] The predictive assessment mandated by s 237 of the Act requires consideration of whether the proposed future act is likely to give rise to interference or disturbance of the kind referred to in s 237. This assessment is not confined to an examination of the legal rights conferred by the proposed future act and evidence of the grantee party's intentions is logically relevant to the question of likelihood (*Smith v Western Australia* at 449-450; *Little v Western Australia* at [69]-[70]; *Silver v Northern*

Territory at [30]). Where there is evidence that a grantee party intends to exercise the rights conferred by the proposed future act in a particular way, it cannot simply be dismissed on the basis that intentions do not always translate into action. Although the weight that can be given to such evidence will depend on a variety of factors, if it is argued that the evidence should be given little weight, there must be a logical reason for doing so. The Tribunal must act on the material before it. Hence, in *Little v Oriole Resources*, which concerned the proposed grant of a miscellaneous licence authorising the construction of mining camp accommodation facilities, the Full Federal Court held on appeal that, had the Tribunal undertaken the predictive assessment required of it,

> it could not, on the evidence, have come to any conclusion other than that the proposed works would be limited in the way asserted by Oriole. In particular, it could not have come to the conclusion that Oriole would be likely, for some idiosyncratic reason contrary to its stated intention, to duplicate existing mining camp accommodation facilities.

[71] In the present matter, the evidence suggests that the grantee party intends to carry out a range of activities in the initial phase of its exploration program, including but not limited to aerial photography, analysis of aeromagnetic and landsat data, analysis of historical exploration data, geological mapping and rock chip sampling. This first phase of work is designed to identify and locate targets ready for further testing by drilling, and succeeding phases may involve more intensive activities such as reverse circulation and diamond drilling depending on the results. As Member Sosso observed in *Walley v Brosnan* at [22], evidence of this nature is of limited assistance to the Tribunal, as '[a]ll it indicates is that the grantee's present intentions are limited to extremely low impact activity which may result in higher impact activity should the initial exploration activities prove fruitful.' However, information about procedures and guidelines adopted by the grantee party will be of considerably greater assistance, and where such information is available, it is open for the Tribunal to conclude that, in the absence of evidence to the contrary, the rights conferred will be exercised in a way that is consistent with the policies adopted by the grantee party.

[72] The first native title party contends that the Government party should, as the relevant regulator, produce evidence to support its assertion that the grantee party will act in accordance with its stated intentions, such as evidence of FMG Group's consistent and continual compliance with tenement conditions (NTP Reply, paragraph 8.9). With respect, this argument inverts the proper order of inquiry in circumstances where a

tribunal of fact is asked to draw inferences about the conduct of a party. The common sense approach to evidence means that, where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn (*Ward v Western Australia* at 217, referring to *McDonald v Director-General of Social Security* at 358). However, the Tribunal must be mindful of the nature of the inference it is being asked to draw, including the seriousness of the subject matter, the inherent unlikelihood of a particular occurrence and the gravity of the consequences that flow from any finding (see *Briginshaw v Briginshaw* at 362 (Dixon J); *Neat Holdings v Karajan Holdings* at 449-450, 451; *Strategic Minerals Corporation v Kynuna* at [40]).

[73] This reasoning underpins the presumption of regularity applied by the Tribunal in matters involving objections to the expedited procedure. In *Walley v Western Australia* at [11], the Tribunal described the presumption of regularity in the following terms:

> 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 [*sic*] the exercise of rights under the grant.

[74] As Deputy President Sumner observed in *Murray v Money* at [53], the presumption is not a legal presumption but an approach to the facts which is appropriate on the evidence. In this sense, the presumption, properly understood, is 'simply a common-sense, logical approach used by the Tribunal in determining a matter in issue before it in applications such as this, namely predicting the future conduct of a grantee party': *Murray v Money* at [12]. Similarly, it is a matter of logic and commonsense that a party will act in accordance with its stated intentions unless there is evidence to the contrary. In the present matter, there is no evidence before the Tribunal which might lead to the conclusion that the grantee party will not act in accordance with its stated intentions, including by observing the policies, procedures and guidelines it has adopted, and no logical foundation has been identified for drawing an adverse inference of the kind suggested by the first native title party.

Materials produced by the Tribunal

[75] On 23 October 2014, the Tribunal circulated to parties maps of the proposed licences produced by the Tribunal's Geospatial Services Unit, noting its intention to rely on the maps in its deliberations and seeking comments from parties.

[76] The Government party indicated that it had no issue with the Tribunal relying on the maps for the purposes of the determination. The grantee party declined to comment on the content of the maps on the basis that they would be used in conjunction with the materials provided by the parties, including any maps, although it noted that the map did not show the locations of sites that had been identified by reference to geospatial coordinates. The native title parties did not comment on the Tribunal's intended use of the maps.

[77] Taking into account the grantee party's comments, I requested the Tribunal's Geospatial Services Unit to produce another map showing each of the proposed licences and the locations of sites identified in the video evidence by reference to geospatial coordinates. This map was subsequently circulated to parties on 19 November 2014. No comments were received from parties in relation to this map.

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

Contentions and evidence in relation to s 237(a)

[78] The first native title party contends that there are three broad categories of community and social activities carried on by the native title holders in the proposed licence areas:

(a) Activities associated with law business and the protection and maintenance of areas, sites and places of significance.

(b) Activities of a general nature conducted by native title holders on the proposed licences, including camping, hunting and gathering, and teaching.

(c) Activities designed to protect and maintain the land and waters within the proposed licences in accordance with the area's values under traditional law and custom, the manifestation of these values noted under the Indigenous Protected Area ('IPA') declared in respect of the Birriliburu determination

area in April 2013 and the classification of the Katjarra/Carnarvon Ranges area under the IPA as an International Union of Conservation Networks ('IUCN') Category III protected area.

[79] In respect of category (a) activities, the first native title party contends that law business is conducted on and near the proposed licences and the whole Katjarra/Carnarvon Ranges area is blocked off while law business is being conducted. The first native title party also contends that access to areas of significance within the proposed licences is restricted and controlled, in some cases on a permanent basis, and these restrictions are enforced. The first native title party submits that uncontrolled exploration activity will restrict law business and clash with activities involved in protecting importance places. Furthermore, the first native title party submits that *wati* may be subject to traditional punishment if they are not permitted to exclude persons from the area and will be 'shamed' if unable to look after sites. The first native title party also submits that women will suffer adverse consequences if they enter a men's site and people may get upset and sick, 'eaten away' or may 'pass away' (NTP Contentions, paragraphs 10.3-10.5, 13.3-13.5, 16.3-16.5).

[80] In this regard, the first native title party submits (at NTP Contentions, paragraphs 10.6, 13.6, 16.6) that any exploration activity will:

(a) necessarily and adversely impact on activities associated with undertaking law business and in the maintenance and protection of sites;

(b) interrupt and interfere with the capacity of the *wati* to freely and of right, access and enjoy the areas in accordance with the terms of the Birriliburu determination and their traditional laws and customs at the times, for the duration of and in the manner of their choosing to undertake law business and protect sites and places of significance; and

(c) cause the harm identified above at [79].

[81] In respect to category (b) activities, the first native title party contends that Putijarra/Martu people attend on the country in the proposed licence areas to get away from the pressures of town and re-embrace a traditional way of life. The first native title party contends that Putijarra/Martu camp, hunt and gather and teach in the

proposed licence areas, and the number of people travelling to the area is so great that requests are being made for additional and permanent facilities to be established. The first native title party submits that exploration activity will affect the amenity of the area and, to the extent that the exploration activity involves the use of water resources on the subject land, will affect hunting by taking water used by animals and in any event by frightening them away from areas where hunting occurs (NTP Contentions, paragraphs 10.7-10.9, 13.7-13.9, 16.7-16.9).

[82] In this regard, the first native title party submits (at NTP Contentions, paragraphs 10.10, 13.10, 16.10) that exploration activity that is not coordinated in a way that is compatible with the hunting, camping, gathering and teaching activities of the Putijarra native title holders will:

(a) necessarily and adversely impact on these activities;

(b) interrupt the capacity of the Putijarra/Martu native title holders to freely and of right access and enjoy the proposed licence areas to undertake those activities in accordance with the terms of the Birriliburu determination and their laws and customs; and

(c) cause the unwanted consequences identified above at [81].

[83] In respect of category (c) activities, the first native title party contends that the proposed licences are part of a significantly larger area of particular cultural and environmental significance known as Katjarra or the Carnarvon Ranges, the significance of which has been recognised in its classification as a IUCN Category III protected area under the IPA. The first native title party contends that activities undertaken in this area include traditional burning of country, feral animal control, research trips, monitoring of endangered species, waterhole clearing, tourist control, signage, removing trespassers, return to country trips and general land management activity. The first native title party contends that the presence of exploration activity will interfere with these land management and caring for country activities by: interfering with the native title holders' capacity to plan these activities in advance; creating dangers when activities such as burning and feral animal control are being undertaken; preventing or interfering with return to country trips; and generally putting these activities at risk (NTP Contentions, paragraphs 10.11, 13.11, 16.11).

[84] In this regard, the first native title party submits that exploration activity that is not coordinated in a way that is compatible with land management activities undertaken by the native title holders will:

(a) necessarily and adversely impact on these activities both now and increasingly in the future;

(b) interrupt the capacity of the Putijarra/Martu native title holders to freely and of right access and enjoy the proposed licence areas to undertake those activities both now and increasingly into the future in accordance with the terms of the Birriliburu determination and their laws and customs; and

(c) cause the unwanted consequences identified above at [83].

[85] Mr Farmer attests to the existence of law grounds within Kanatukul and the area known as Mt Methwin. Mr Farmer states that these sites are restricted to *wati* and are regularly used for law business, which is usually undertaken over the warmer months but can occur at other times of the year. Mr Farmer also states that sacred objects are stored in and around these sites. Mr Farmer deposes that all roads in the area are closed while law business is taking place so that *wati* can travel in and through the area in ceremonial attire and carrying ceremonial objects without being observed by non-*wati*. According to Mr Farmer, it is very important to ensure the proper rituals associated with law business are observed (DAF Affidavit, paragraphs 13, 18).

[86] Mr Farmer also states that native title holders from various locations travel to the area to hunt and camp. Mr Farmer states that families normally visit the area during school holidays, while people who do not have children tend to visit the area any time during the cooler months. According to Mr Farmer, people visiting the area from places in the south such as Wiluna tend to travel west from Well 5 on the Canning Stock Route and camp at Blue Hills Reserve or the old Blue Hills community, whereas people travelling from the north come in through Ned's Creek Station from the west and often camp at Good Camp Rockhole or further north at Katjarra Rockhole or Virgin Springs. Mr Farmer attests that people visit the area 'to get back onto country and away from the pressure of town and … re-embrace the traditional way of life that many of them grew up with' and says that the presence of mining companies would interfere with this. According to Mr Farmer, '[t]here are so many people travelling

into the *Katjarra* area now that the old people have asked the Birriliburu rangers to create a new permanent facilities [*sic*] there' (DAF Affidavit, paragraphs 23-26).

[87] Ms Farmer states that native title holders 'go camping at Blue Hills and Carnarvon Ranges all the time, at holiday time and to take the kids away from getting into trouble' (JF Affidavit, paragraphs 13). Frankie Wongawol also describes the Katjarra/Carnarvon Ranges area as 'one of the main spots' for bringing children on country to teach them about culture, and says it is 'good hunting country' (FW Affidavit, paragraphs 8-9). This is also supported by the evidence of Dr Sackett, who also states that he is aware through his research of this transmission of knowledge occurring in and around the Carnarvon Ranges (LS Affidavit, paragraph 13). Ms Long states that she 'go[es] up to the Carnarvon Ranges whenever I can go with other people as [I] don't have a good motor car, otherwise we would go more often.' Ms Long deposes that the Carnarvon Ranges is a 'good spot for bush tucker' and there are plenty of bush turkey and emus, especially around E69/2726 and Blue Hills. Ms Long says there is a permanent water source at Kanatukul, which is used by animals inhabiting the area, and she notes that there is 'good water' at Blue Hills as well (LL Affidavit, paragraphs 9-10, 12, 17).

[88] Robbie Wongawol states that, as head ranger, he was engaged in burning, cleaning rockholes, monitoring feral animals and other land management activities in the Katjarra/Carnarvon Ranges area. According to Mr Wongawol, the area was selected by native title holders as a priority area for these activities and, at the time of making his affidavit, rangers were visiting the area once every two months (RW Affidavit, paragraphs 10, 15). Mr Thomas states that the declaration of the IPA has allowed the first native title party to develop a ranger program involving 80 participants over the previous year, and the aim is to increase the frequency and duration of ranger activity over the next few years with a view to establishing a full time presence in the cooler months. To this end, rangers have been involved in the construction of permanent camps for the use of rangers and other native title holders in the Katjarra/Carnarvon Ranges area, the first of which was established near Good Camp Rockhole in October 2013. Mr Thomas states that, since the construction of the camp, rangers have been visiting the area at a rate of one week in every month between March and October, with each trip involving approximately 15 participants at a time. Mr Thomas states

that a second camp has since been established in the vicinity of Yamada Rockhole (RMT Affidavit, paragraphs 9-13).

[89] According to Mr Thomas, ranger activities in the Katjarra/Carnarvon Ranges area are planned by the first native title party on an annual basis, with the assistance of CDNTS staff. These activities revolve around 'looking after country' and include efforts aimed at regulating access to the area by erecting signs at and diverting tracks around culturally sensitive areas; conservation-based activities such as monitoring of threatened and introduced flora and fauna; cleaning out rockholes; and burning country. Mr Thomas states that scheduled burning occurs every year both on the ground and from the air, and he estimates that parts of the proposed licence areas would on average be burnt up to twice a year. Mr Thomas states that this is one of the reasons why access to the area is regulated (RMT Affidavit, paragraphs 10-11, 14-18). Mr Farmer states that rangers are also involved in facilitating return to country trips for native title holders who are unable to travel to the area independently (DAF Affidavit, paragraphs 30-36). Ms Drake deposes that it is the ecological variety of the Katjarra/Carnarvon Ranges that is able to support the range of cultural and conservation-based activities undertaken by rangers, many of which are carried on in partnership with organisations such as the Department of Parks and Wildlife, the University of Western Australia and Trackcare WA (EGD Affidavit, paragraphs 6-7).

[90] In relation to the evidence of activities associated with law business, the Government party notes that Mr Farmer refers to sites within Mt Methwin as being within E69/2722, whereas the map of E69/2722 annexed to the affidavit of Mr Weaver indicates that Mt Methwin is situated some distance to the north of the proposed licence area. The Government party also notes that Mr Farmer deposes that Good Camp Rockhole lies within E69/2726, whereas the map annexed to the Weaver affidavit shows that it lies outside the north-western boundary. On this basis, the Government party contends that it is open for the Tribunal to infer that Mr Farmer does not have an accurate understanding of the boundaries of the proposed licences and it should be cautious in accepting the evidence of Mr Farmer that particular places or activities are situated or occur within the proposed licence areas (GVP Contentions, paragraph 54). In reply, the first native title party contends that the peak of Mt Methwin is location no more than three kilometres north of E69/2726 and Mr

Farmer's references to sites 'within' Mt Methwin and to 'Mt Methwin and surrounds' suggest that the name not only refers to the specific peak but also to a broader area. The first native title party says this interpretation is supported by the affidavit of Mr Thomas, who states that Mt Methwin and Virgin Springs are 'in part' within E69/2722 (NTP Reply, paragraph 7.5).

[91] The Government party contends that the storage of secret or sacred objects and restrictions on access do not amount to community or social activities, and the fact that *wati* may be punished if they are not permitted to exclude people from particular areas or the belief that women may suffer adverse consequences if they were to enter a men's site are not relevant to s 237(a) (GVP Contentions, paragraphs 73-74, 76, 82). In reply, the first native title party contends that these matters are directly associated with and integral to the conduct of law business and the protection of significant sites, and should not be viewed in isolation (NTP Reply, paragraph 7.6-7.8).

[92] The Government party also contends that it is highly unlikely the activities of the grantee party will interfere with law business given the brief periods in which law business occurs, the protocols adopted by the grantee party and the remoteness of the area (GVP Contentions, paragraph 80). In reply, the first native title party submits that the Government party has offered no evidence to support the suggestion that periods of law business are 'brief' or any guidance as to what constitutes a 'brief period' of time. Furthermore, the first native title party notes that the procedures, policies and protocols referred to in the Weaver Affidavit mainly relate to the protection of cultural heritage rather than the conduct of community activities (NTP Reply, paragraphs 7.11-7.12).

[93] In relation to the general activities said to be carried on by the native title holders in the proposed licence areas, the Government party contends that there is no basis for concluding that native title holders camp, hunt and gather, and teach within the proposed licence areas rather than simply in the general vicinity. In particular, the Government party notes that the only site referred to by Mr Farmer in relation to E69/2722 is Virgin Springs, which appears from the map annexed to Mr Weaver's affidavit to be outside the north-eastern boundary. The Government party also submits that, though Ms Long states that she travels to the Carnarvon Ranges whenever she can, she does not refer to any specific area within the proposed licences and, in any

event, the activity is of an individual nature rather than a community or social activity for the purposes of s 237(a) (GVP Contentions, paragraphs 85-87).

[94] In reply, the first native title party contends that Mr Farmer refers to both Katjarra Rockhole and Virgin Springs in the context of activities undertaken on E69/2722. Although Virgin Springs is depicted on the map as being outside the proposed licence area, the native title party submits that it is less than one kilometre from the boundary, and the effect of Mr Farmer's evidence is that the native title holders hunt and camp 'in the area all around these places.' Moreover, the first native title party submits that, if a drill rig or exploration camp were to be placed on the boundary near the site, it would nevertheless have a detrimental impact on the ability of native title holders to camp at the rockholes. In relation to the Government party's submissions regarding Ms Long's evidence, the first native title party submits that social activities can encompass activities carried on by an individual or small group in certain circumstances and, in any event, Ms Long deposes to travelling to the Carnarvon Ranges with other native title holders (NTP Reply, paragraphs 7.13-7.14).

[95] In relation to land management activities, the Government party submits that the first native title party's contention that the proposed licences are part of a significantly larger area of cultural and environmental significance which has been classified as an IUCN Category III protected area is not relevant to the inquiry. Furthermore, the Government party contends that the evidence of Mr Farmer and Frankie Wongawol regarding land management activities does not specify any particular areas where such activities are said to occur. Similarly, the Government party contends that the evidence of Ms Drake only indicates that specific land management activities were carried out to the north of E69/2722 and, although it accepts that there is some level of long-term monitoring within E69/2722 to control and manage the threat of foreign flora and flora, there is no evidence the grantee party is likely to interfere with this or other land management activities (GVP Contentions, paragraphs 91-96). In reply, the first native title party submits that the designation of the area as an IUCN Category III protected area officially recognises its high cultural and conservation value. The first native title party contends that the evidence establishes that native title holders actively manage the proposed licence areas and have established permanent camps to

facilitate and support the conduct of social and community activities, including land management activities (NTP Reply, paragraphs 7.15-7.19).

[96] The Government party contends (at GVP Contentions, paragraph 99) that, to the extent the evidence demonstrates that native title holders carry on community or social activities within the proposed licence areas, direct interference is unlikely to occur for the following reasons:

(a) The grantee party has stated that it is cognisant of its obligations under the AHA, adopts processes and procedures to avoid unauthorised interference with Aboriginal sites, and has a policy not to undertake ground disturbing activities without a heritage survey having first been undertaken. Accordingly, any ground disturbing activities will be conducted in such a way as to not adversely impact on heritage sites.

(b) The grantee party has indicated its willingness to enter into an RSHA with the native title parties, which is a relevant factor in determining that there is not likely to be inference with the community or social activities of the native title holders, as it indicates its willingness to consult with the native title parties and avoid activities likely to interfere with the activities of the native title parties.

(c) The proposed licence areas have been subject to prior mineral exploration and pastoral activities, and it is likely these activities have affected, and will continue to affect, the extent to which community and social activities can be carried on in the relevant area.

(d) There are no Aboriginal communities in the proposed licence areas.

(e) The nature of the exploration activities planned by the grantee party do not appear likely to have any real or substantial disruptive effect on the infrequent land management activities that may occur in particular areas of the proposed licences, particularly given the intentions of the grantee party to conduct those activities with cultural sensitivity and maintain good relations with the native title parties. The possibility that the activities of the grantee party and the

native title parties may intersect does not mean there is a real chance of interference.

(f) Camping, hunting and gathering are, by their nature, inherently capable of coexistence with exploration activities, and the Tribunal has found on numerous occasions that the grant of an exploration licence is not likely to interfere with hunting.

(g) To the extent that activities conducted by the native title parties consist of law ceremonies within the proposed licences, exploration activities will only potentially intersect in the limited period during which law business is held, and there is no indication that interference is likely given the brief duration of law business and the protocols adopted by the grantee party.

[97] In reply, the first native title party contends (at NTP Reply, paragraph 7.21) that:

(a) the protocols adopted by the grantee party relate largely to site protection and do not address the conduct of community and social activities;

(b) the Government party has not produced any evidence which establishes that the grantee party will formally engage with the first native title party regarding the interaction between exploration activities and the conduct of community and social activities;

(c) the community and social activities detailed by the first native title party go beyond hunting and camping, and are of such a nature and intensity that coexistence with exploration activities is not possible without consultation and meaningful engagement between the grantee party and the first native title party;

(d) the Government party has failed to direct the Tribunal to relevant decisions which support the contention that hunting and camping are inherently capable of coexistence with mineral exploration; and

(e) it is not within the knowledge of the Government party to determine that law business conducted by the first native title party is likely to be ‘brief’ and

therefore not capable of being interfered with by the activities of the grantee party.

Relevance of AHA and RSHA to s 237(a)

[98] The Government party contend that the grantee party's awareness of its obligations under the AHA and its willingness to enter into an RSHA with the native title parties are relevant to determining the likelihood of interference with the community or social activities of the native title holders. Specifically, the Government party submits that the AHA, in conjunction with the policies and procedures adopted by the grantee party, will ensure that ground disturbing activities are not conducted in a way that will adversely affect heritage sites, and the grantee party's willingness to enter into an RSHA indicates its willingness to consult with the native title parties to avoid activities likely to interfere with community or social activities (GVP Contentions, paragraph 99).

[99] The first native title party contends that the AHA has no relevance to the question of whether the proposed licences are likely to interfere with community or social activities, as the object of the AHA is 'the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia' and it does not address community or social activities as contemplated by s 237(a). In relation to the RSHA, the first title party notes that its operative provisions are completely silent as to consultation about community and social activities, and the grantee party's offer to enter the RSHA merely evidences the grantee party's willingness to abide by the provisions of the RSHA, rather than consult more broadly (NTP Reply, paragraphs 5.3-5.4, 6.1-6.2, 7.2).

[100] I accept the contention that the AHA is concerned with the preservation of Aboriginal sites and objects rather than preventing interference with community and social activities. Nevertheless, the AHA may be relevant where the evidence suggests that certain activities are associated with areas that might otherwise be protected under the AHA (see *Western Desert Lands v Teck Australia* at [75]). In terms of the relevance of the RSHA to the inquiry under s 237(a), the Government party relies on the Tribunal decision in *Cherel v Faustus Nominees*. As I noted in *Western Desert Lands v Teck Australia* at [73], the outcome of that decision did not depend on the grantee

party's offer to enter into an RSHA but on the existence of detailed evidence from the grantee party in relation to its exploration program, previous negotiations with the native title party and commitment to working with the traditional owners to address their concerns. However, the Tribunal has previously accepted that the RSHA may have some relevance to s 237(a), even though it is 'designed principally to deal with issues arising under s 237(b)' (see *Sturt v Baracus* at [55], citing *Tullock v Western Australia* at [48]). Similarly, in *Western Desert Lands v Teck Australia*, I accepted that, because ground disturbing activity is likely to trigger the consultation process under the RSHA, this might provide an opportunity for consultation with respect to any community or social activities carried on in the area.

[101] The first native title party also relies on the evidence of Ms Akumu, who states that the grantee party was offered, and failed to respond to, a land access agreement proposed by the first native title party. The first native title party submits that, in light of Ms Akumu's evidence, the grantee party cannot reasonably be said to have demonstrated any willingness to enter into an agreement which addresses most of its concerns (NTP Reply, paragraph 7.3). The conduct of the grantee party in negotiations 'conducted in the shadow of objection proceedings' may well be relevant to the predictive assessment required under s 237 of the Act (see *Cherel v Faustus Nominees* at [32]). However, though it appears the grantee party did not respond to the proposed land access agreement, I am not prepared to draw any adverse inferences from this fact. The grantee party's conduct may have simply amounted to a rejection of the proposed agreement, especially in the context of the subsequent offer of the RSHA. As the Tribunal noted in *Velickovic v Westex Resources* at [19], the question of whether an agreement was accepted or rejected by the grantee party in the course of any discussions subsequent to the lodgement of an objection is irrelevant to the task the Tribunal must undertake, and it is not the Tribunal's role to endorse one agreement over another (see *Champion v Western Australia* at [46]). However, I do note that the grantee party's offer of the RSHA is conditional on its acceptance and execution by the relevant native title party prior to any determination by the Tribunal. While the DMP Guidelines provide that the Government's policy is to progress applications for exploration licences through the expedited procedure 'only after it is satisfied that the explorer has formally agreed to address Aboriginal heritage concerns within the tenement application' (including by way of an offer to enter into an

RSHA), and the principles of the DMP Guidelines are endorsed by the grantee party, the policy regarding the use of the expedited procedure does not appear to have been strictly followed in this case. In these circumstances, it is difficult to conclude that the grantee party remains willing to engage with the native title parties on the basis of the RSHA.

What constitutes interference for the purposes of s 237(a)

[102] The first native title party contends that the definition of interference in s 237(a) includes both objective and subjective elements. In this context, the first native title party refers to the interpretation suggested by Deputy President Sumner in *Tullock v Western Australia* at [105]-[106], where he held that the ordinary meaning of the words 'to interfere' in the context of s 237(a) is 'action which has the effect of hampering or affecting adversely any community activities of the native title holders.' In the first native title party's submission, the 'objective' element of the test requires the Tribunal to determine whether an activity or process is prevented or hampered, whereas the 'subjective' element involves a determination of whether the interference prevents the activity or process from being conducted properly or whether that interference is unwanted. On this interpretation, the question of whether an act is likely to interfere with community or social activities does not simply involve an examination of the likelihood that an action, activity or process will be stopped, delayed or hampered on objective criteria, but may also require an investigation of whether, from the point of view of those undertaking the action, activity or process, the act is likely to stop, delay or hamper the action, activity or process from being conducted properly or whether the interference is unwanted (NTP Contentions, paragraph 7.5).

[103] In my view, the contention that s 237(a) involves a subjective assessment cannot be accepted. It seems to me that whether something is likely to interfere directly with the carrying on of a particular activity can only be determined objectively. However, that is not to say that the nature of the activity is irrelevant to determining the likelihood of interference.

[104] The first native title party submits that s 237(a) does not qualify or limit the types of activities to which it relates, other than requiring that they are community or social

activities. Accordingly, the first native title party submits that the Tribunal's interpretation of s 237(a) as requiring activities to be physical and not purely spiritual in nature is incorrect and inconsistent with a beneficial interpretation of the Act. In my opinion, the latter submission is plainly wrong. Section 237(a) is directed to the likelihood of interference with the 'carrying on' of community or social activities. As Deputy President Franklyn observed in *Drury v Western Australia* at [17.2], there is an evident distinction between the activity itself and the physical aspects of carrying on the activity. Although the Tribunal may take into account the non-physical or spiritual aspects of a particular activity, there must nevertheless be evidence that the proposed future act is likely to result in direct physical interference with the activity in question (see *Silver v Northern Territory* at [50]-[62]). Accordingly, evidence that the proposed future act may cause emotional or spiritual distress on the part of individual members of the community will not be sufficient (see *Walley v Western Australia* at [13]-[21]). This approach is consistent with the text and legislative history of s 237(a). Although the Act is remedial in character and must be construed beneficially, the interpretation must nevertheless be consistent with the actual language employed by the Act (see *Kanak v National Native Title Tribunal* at 124).

[105] In determining the likelihood of interference, the Tribunal must nevertheless have regard to the nature of the activity in question. For example, it cannot be said that an activity is not adversely affected if, for reasons attributable to the proposed future act, the activity can only be carried on in a substantially different manner. In this respect, the Tribunal is entitled to take into account the essential characteristics of the activity, including the content of any traditional laws and customs which inform or underpin the activity. This is particularly so given that s 237(a) is concerned with those activities which are a manifestation of the native title party's registered native title rights and interests (see *Silver v Northern Territory* at [58]; *Tullock v Western Australia* at [96]). However, the native title party cannot merely assert that the proposed future act is likely to result in unwanted effects, and there must be evidence the apprehended interference will be substantial in its impact upon community or social activities (cf *Smith v Western Australia* at [26]).

Consideration of s 237(a)

[106] I accept that the native title holders regularly camp at Blue Hills Reserve, Good Camp Rockhole, Katjarra Rockhole and Virgin Springs during school holidays and other times in the cooler months of the year. Although it appears that these places are (with the exception of Blue Hills Reserve) situated outside the proposed licence areas, I accept that native title holders engage in hunting and gathering in the general vicinity of these places and it is likely that these activities are carried on in the proposed licence areas, particularly given the proximity of the camping sites. It is also apparent that young people are taken to the Katjarra/Carnarvon Ranges area to keep them out of trouble and to pass on traditional knowledge, although it is not clear how frequently these activities occur.

[107] I also accept that law business is carried on in warmer months and perhaps at other times of the year at places in the vicinity of Kanatukul and Mt Methwin. Although Mt Methwin is located approximately three kilometres north of E69/2731, I accept that Mr Farmer uses the name to describe a larger area that includes the Katjarra and Virgin Springs waterholes, which are located in close proximity to the northern boundary of E69/2722. The video evidence also indicates that there are law grounds near Talbot Rockhole, which is located in close proximity to the eastern-most border of E69/2722. On balance, I accept that there are law grounds located within or in close proximity to E69/2722 and E69/2726. I also accept that *wati* are likely to travel between Kanatukul and the Mt Methwin area during periods of law business.

[108] It is clear from the evidence that the native title holders undertake a variety of activities aimed at regulating access to the Katjarra/Carnarvon Ranges area and particular places within it. These activities include: the erection of signs; the diversion of existing tracks and the creation of new, more culturally appropriate tracks; and the physical removal of people from areas of exclusive possession. It was also suggested that roads in the area are closed to non-*wati* during law business. Although I am satisfied these activities may be regarded as community or social activities, as they are undertaken at the direction of the community of native title holders with a view to enforcing their rights to exclusive possession, I am not satisfied the grantee party is likely to interfere with them. Section 237(a) is concerned with the likely effect of the act on activities rather than the exercise or enjoyment of native title rights and

interests (see *Mungarlu Ngurrarankatja Rirraunkaja v Zenith Minerals* at [51]). The grant of the proposed licences cannot be said to involve interference for the purposes of s 237(a) simply because the grantee party's presence in the area is unwanted. Similarly, evidence as to the adverse consequences which might arise from a failure to meet obligations to look after country or the breach of protocols concerning access to certain sites is unlikely to support the conclusion that interference is likely to occur unless there is evidence that there is likely to be consequences for the native title holders' community or social activities (see *Walley v Western Australia* at [21]; *Western Desert Lands v Teck Australia* at [64]-[65]). There is no such evidence in the present case.

[109] It is also clear that the Katjarra/Carnarvon Ranges area is the focus of land management and caring for country activities carried on through the ranger program established by the first native title party. These activities include the measures described above aimed at regulating access to the Katjarra/Carnarvon Ranges area as well as activities involving the monitoring of native and introduced flora and fauna; cleaning out rockholes; and burning areas of country. The evidence suggests that rangers visit the Katjarra/Carnarvon Ranges area at a rate of one week in every month, and permanent camps have been established at Good Camp Rockhole and Yamada Rockhole to facilitate these activities. These activities have apparently intensified since the establishment of the camps and the declaration of the IPA and it appears there are plans to further increase the presence of rangers in the area in coming years.

[110] The Government party submits that activities undertaken by Birriliburu rangers with the assistance of the Department of Parks and Wildlife and the University of Western Australia as attested to in the affidavit of Ms Drake are not 'community or social activities' for the purposes of s 237(a) and are more properly activities of the Department of Parks and Wildlife and the University of Western Australia undertaken with the assistance of native title holders (GVP Contentions, paragraph 52). I reject that submission. The first native title party has the right of possession, occupation, use and enjoyment of the land to the exclusion of all others, exercisable in accordance with the traditional laws and customs of the native title holders. The evidence of Ms Drake is that the activities in question are undertaken with the assistance of the Department of Parks and Wildlife and the University of Western Australia and Mr

Thomas describes them as being 'indigenous-led'. It is also apparent from the evidence of Mr Thomas and Ms Drake that the activities form part of a broader range of conservation and land management activities undertaken by rangers under the direction of senior elders and the broader community of native title holders. In my view, the activities are absolutely consistent with the obligations owed by native title holders under traditional law and custom and have a broader social and cultural function. The fact that these activities are undertaken with the assistance of other organisations in no way deprives them of their essential character as 'community' or 'social' activities.

[111] The first native title party contends that evidence of regular travelling, camping and hunting is sufficient to sustain an objection under s 237(a) (NTP Contentions, paragraph 7.15). Though evidence of this nature will certainly carry weight in terms of the predictive assessment required under s 237(a), it is not necessarily conclusive. The evaluation required under s 237(a) is contextual, and the Tribunal will need to have regard to other factors that might affect the likelihood of interference (see *Smith v Western Australia* at [27]). For example, the Tribunal has often had regard to the size of the proposed future act compared with the rest of the claim or determination area in evaluating the likely degree of interference (see for example *Cheinmora v Heron Resources* at [31]; *Boddington v Bacome* at [43]-[44]). Similarly, the Tribunal has taken into account the fact that access by a grantee party will often be limited to the area in which exploration is taking place and temporary in nature (see *BW v Ling* at [21]). On the other hand, the Tribunal has also found that the risk of interference may be greater where the area in question has unique qualities compared with other areas in the claim or determination area or where there is evidence that activities are associated with specific locations (see *WF v Kingx* at [39]; *Tullock v Western Australia* at [112]).

[112] In the present case, I accept that the Katjarra/Carnarvon Range area has unique cultural, environmental and ecological characteristics that stand out from the rest of the determination area. I also accept that the area contains several places where native title holders regularly camp, such as Good Camp Rockhole, Virgin Springs, Katjarra Rockhole and Blue Hills Reserve. In the circumstances, I consider there would be a real risk of interference with camping and hunting if these areas were subject to

intensive exploration activity. However, I am satisfied that compliance with the grantee party's policies and procedures with respect to site protection will ensure there is an opportunity for consultation regarding possible interference with these activities if intensive exploration is proposed in these areas. This will also ensure that the amenity of these areas will not be adversely affected by the proposed exploration.

[113] In relation to the supposed effect on the presence of animals and the effect this may have on hunting, I do not accept that the grantee party's activities will have a significant effect on water sources or the distribution of wildlife in the area, as these activities are likely to be localised to the specific areas in which exploration is being conducted at any given time.

[114] I also find that the grantee party's activities are unlikely to interfere with land management activities such as cleaning out rockholes and the monitoring of threatened and introduced flora and fauna. It is possible that, without consultation, the grantee party may interfere with the maintenance of rockholes by conducting works that restrict the access of native title holders to, or physically disturb, particular rockholes. However, as noted above, I am satisfied the policies and procedures the grantee party has adopted in relation to site protection and ground disturbance will ensure there is an opportunity for consultation about the possible effect of proposed works on these activities. Similarly, I am satisfied on the evidence before me that the grantee party's activities are unlikely to interfere substantially with plot-based or track-based monitoring activities. In particular, I note that the grantee party's Heritage Guidelines indicate that all employees and contractors engaged by the grantee party are instructed not to drive off existing roads and tracks and to comply with GDP conditions, which require consultation with traditional owners prior to undertaking ground disturbing activity.

[115] On the other hand, I consider there is a real risk that, in the absence of consultation, the grantee party's presence in the proposed licence areas will interfere with the scheduled burning of country. According to Mr Thomas, burning expeditions are scheduled on an annual basis, and he estimates that parts of the proposed licence areas 'would on average be burnt perhaps up to twice a year' (RMT Affidavit, paragraph 17). Mr Farmer acknowledges that care must be taken when burning country to make sure people are not endangered, particularly given the number of people travelling to

the area. However, Mr Farmer states that rangers make sure people in the community are aware of when they are burning out on country (DAF Affidavit, paragraph 32-33). Mr Thomas also states that strategic burning is one of the reasons why the first native title party controls access to the Katjarra/Carnarvon Ranges area, which extends to the proposed licence areas (RMT Affidavit, paragraphs 17-18, 21; cf Mr Thomas' description of the Katjarra/Carnarvon Ranges IUCN area at [149] below). In the circumstances, I accept there is a real likelihood that the grant of the proposed licences could interfere with these activities unless the grantee party engages in direct consultation with the native title holders prior entering to the areas.

[116] Though the grantee party has offered to enter into the Central Desert RSHA, which requires the grantee party to give notice of its intention to undertake non-ground disturbing activity, I do not consider that the level of notice required in the Central Desert RSHA is likely to be adequate from the point of view of ensuring the grantee party's presence in the area does not interfere with the planning and execution of scheduled burning (see *Western Desert Lands v Teck Australia* at [80]). In any event, I note that the grantee party's offer to enter into the RSHA appears to be conditional on the withdrawal of the objections.

[117] I also find there is a real risk the grant of E69/2722 and E69/2726 will interfere with the conduct of law business, particularly considering the probable existence of law grounds within and in close proximity to these areas (there does not appear to be any evidence of law grounds within or in close proximity to E69/2727). In the circumstances, I accept there is a real likelihood the grantee party could inadvertently come across the native title holders while law business is being carried on. I also accept there is a real chance the grantee party could come across *wati* who are travelling in the area between Kanatukul and Mt Methwin for the purposes of undertaking law business. According to Mr Thomas, it is important for *wati* to be able to travel in and through the area in ceremonial attire and carrying ceremonial objects without being observed by others. For this reason, roads in the area are closed to non-*wati* while law business is being conducted (DAF Affidavit, paragraph 18). Given the nature of the activity, I do not consider that this would merely amount to a trivial interference. Furthermore, I do not accept that the interference is any less substantial simply because law business only occurs over specific periods in remote areas of

country. Indeed, the video evidence indicates that law business can carry on for months at a time. Though it is unlikely this was meant to imply that law business is carried on continuously over successive months rather than intermittently, it nonetheless indicates the ongoing risk of interference. In my view, the evidence supports the conclusion that the conduct of law business would be substantially interfered with if the grantee party were to come across *wati* while they are conducting law business or travelling through the area for that purpose.

[118] In conclusion, I am satisfied there is a real risk of interference with community and social activities carried on by the native title holders unless the grantee party engages with the first native title party in a process of negotiation and consultation as required by s 31 of the Act.

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

Contentions and evidence in relation to s 237(b)

[119] The first native title party contends that there are sites, areas, places and meandering dreaming or *tjukurrpa* tracks of particular significance to the native title holders within or near the proposed licence areas whose location and significance is often only known to those with the requisite cultural authority and experience and which will inevitably be susceptible to interference from even low levels of exploration activity (NTP Contentions, paragraphs 11.1, 14.1, 17.1). In particular, the first native title party submits that:

(a) there are rockholes within and immediately adjacent to E69/2722 and E69/2726;

(b) there are law grounds within and adjacent to E69/2722 and E69/2726;

(c) there are secret/sacred paintings within and adjacent to E69/2722 and E69/2726

(d) there are sacred objects stored within and adjacent to E69/2722 and E69/2726;

(e) there are dreaming tracks that meander through the proposed licence areas and whose location is known only to certain people with the requisite cultural authority and knowledge;

(f) many of the sites, places and areas within E69/2722 and E69/2726 are linked, so that interference at one place necessarily interferes with the other;

(g) there is a site within E69/2727 that is linked to Kanatukul and Mt Methwin;

(h) there are restrictions placed on non-*wati* approaching or entering secret/sacred places; and

(i) the consequences of inference with sites, areas, places and meandering dreaming or *tjukurrpa* tracks can be severe.

[120] The first native title party contends that many of the sites and places in E69/2722 and E69/2726, and the site in E69/2727, are inexorably linked, forming a wider cultural landscape or area of significance (NTP Contentions, paragraph 14.2).

[121] According to Mr Farmer, there are special places within the vicinity of Mt Methwin and Kanatukul, some of which are open to men and women and others of which are restricted to *wati*, being places where law business occurs. This is also apparent from the video evidence. Mr Farmer also says there are places within the Mt Methwin area and Kanatukul that feature rock art, some of which may only be viewed by *wati*. Mr Farmer states that places within Mt Methwin and Kanatukul are closely linked by a specific *jukurrpa*, meaning that interference with one site may affect the other. Mr Farmer also deposes to the existence of two other *jukurrpa* which are said to travel through the Katjarra/Carnarvon Ranges area and describes a site to the east of Blue Hills Reserve in E69/2727 which is connected to Mt Methwin and Kanatukul through a particular *jukurrpa* (DAF Affidavit, paragraphs 11-15). Mr Williams also refers to the existence of dreaming tracks and songlines that 'run all around the ranges' (SW Affidavit, paragraph 13).

[122] Frankie Wongawol describes Kanatukul as a 'particularly important place' and says the area features rock art which only very senior *wati* have authority to speak about (FW Affidavit, paragraph 14). Robbie Wongawol also refers to paintings at Kanatukul

which women are not allowed to see (RW Affidavit, paragraph). Dr Sackett states that the rock art has religious meaning and Mr Langford says that the art contains features which are of the 'highest level of importance' (LS Affidavit, paragraph 26; LGL Affidavit, paragraph 32). This is also supported by the video evidence. Frankie Wongawol deposes to the existence of two 'big' *jukurrpa* tracks within E69/2726 and says there are *ngulu* (sacred, secret) places both within the proposed licence area and the broader Katjarra/Carnarvon Ranges area, including around Kanatukul and to the south of Katjarra (FW Affidavit, paragraphs 10-17). This is also apparent from the video evidence, which indicates that men's places exist within Kanatukul and in the vicinity of Talbot Rockhole near the western-most boundary of E69/2722. Ms Long also deposes to the existence of places within the Carnarvon Ranges that women are not allowed to enter, though she also says there are other places in Kanatukul where women are permitted (LL Affidavit, paragraph 13).

[123] The Government party submits that the Tribunal cannot be satisfied that Mr Farmer is sufficiently aware of the boundaries of each of the proposed licences and the most beneficial interpretation of his evidence is that some sites which he considers to be significant exist somewhere within the vicinity of E69/2722 (GVP Contentions, paragraph 120). I have already addressed this question in relation to Mt Methwin (see [107] above). Nevertheless, I accept the Government party's characterisation of Mr Farmer's evidence insofar as it relates to the location of individual sites, noting however that Mr Farmer's evidence should be evaluated in the context of the other materials before the Tribunal.

[124] In relation to the video evidence, the Government party submits that the evidence given with respect to a rockhole on the north-eastern boundary of E69/2722 does not explain the significance of the site or how exploration may interfere with the site. The Government party also notes that one of the people giving evidence for the video states that tourists can enter the site if they 'respect the area' (GVP Contentions, paragraph 125-126). I note that, based on Tribunal mapping, the coordinates appear to correspond to the location of Virgin Springs, which is consistent with the other evidence.

[125] In reply, the first native title party contends that the video evidence establishes that Virgin Springs is a site of particular significance as a location of permanent water, and

submits that access by tourists who 'respect the area' (and by implication do not interfere with the site) is not inconsistent with its status as a site of particular significance (NTP Reply, paragraph 8.11).

[126] The Government party contends (at GVP Contentions, paragraphs 129, 133 and 138) that, in the event there are any areas or sites of particular significance within the proposed licence areas, interference is not likely to occur for the following reasons:

(a) The grantee party is aware of the existence of those sites and its legal obligations in respect of them and it has agreed to work with the first native title party through the RSHA to avoid interference.

(b) The grantee party has stated that it is cognisant of its obligations under the AHA, has adopted processes and procedures to avoid unauthorised interference with Aboriginal sites, and has a policy not to undertake ground disturbing activities without a heritage survey having first been undertaken. The Government party submits that any ground disturbing activities are intended to be conduct in a way which will not adversely impact on heritage sites and which will respect local Aboriginal cultural concerns.

(c) While it may be the belief of the first native title party that any level of ground-disturbing activity will disturb songlines, interference with songlines is not covered by s 237(b) of the Act as they are not 'areas' or 'sites' within the meaning of that section.

(d) The proposed licence areas have been subject to prior mineral exploration and pastoral activity. The Government party submits that the activities contemplated by the grantee party would be the same as, or no more significant than, the previous and continuing use of the area.

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

[127] In reply, the first native title party contends (at NTP Reply, paragraphs 8.15-8.16) that:

(a) the AHA is not a complete answer to the question of whether there is likely to be interference of the kind contemplated by s 237(b), and the grantee party's awareness of its obligations under the AHA are therefore not sufficient to prevent interference;

(b) the RSHA is ineffective to prevent the kind of interference contemplated by s 237(b), particularly where there is evidence that identifies sites of particular significance to which access must be restricted to men as a matter of traditional law and custom; and

(c) the grantee party has not disclosed on what basis, and by whom, interference with Aboriginal sites will be 'authorised'. In this regard, the first native title party notes the existence of provisions under the RSHA which it says facilitate the destruction of or damage to sites of particular significance through applications under s 18 of the AHA for ministerial consent to destroy or damage a site without the consent of the first native title party.

Adoption of previous findings

[128] The first native title party submits that the Tribunal should adopt the finding of Member O'Dea in *Mungarlu Ngurrarankatja Rirraunkaja v Zenith Minerals* that Kanatukul is an area of particular significance to the first native title party. The relevant passages of that decision are as follows:

> [61] In the present matter, the evidence establishes that Kunukutul [*sic*] is a point at which several jukurrpa converge and intersect. The evidence also suggests that Kunutukul [*sic*] comprises a cluster of associated sites rather than an individual site. The evidence also establishes that Kanakutul [*sic*] and other sites within the Carnarvon Ranges, such as the wati kutjarra ceremonial ground, are connected by, and draw their significance from, the jukurrpa, and are connected by songlines to other places of religious significance in Birriliburu country. Accordingly, I accept that Kunukutul [*sic*] is an area of particular significance to the native title holders. I also accept that, on the evidence before me, the ceremonial ground can be characterised as a site of particular significance. However, I am not satisfied that the evidence establishes that the Carnarvon Ranges fall within either category, whether in the narrow geographic sense or in the sense of the broader area suggested by the native title party. Though I acknowledge that the Carnarvon Ranges are important to the native title holders for a variety of reasons, the evidence does not support a finding that the ranges constitute an area of particular significance to the native title party or what the boundaries of such an area would be. Rather, the evidence indicates that Kanakutul [*sic*] is the focal point of the various songlines and stories that connect the area to the rest of Birriliburu country. If Kunukutul [*sic*] is connected to Kajarri and possibly other sites to the north of the tenement areas, they are more appropriately characterised as discrete sites than a single area. This interpretation is consistent with the Tribunal's findings in *Emergent* and *Allarrow*. While I accept that Kajarri and other sites to the north of the proposed

licences may be sites of particular significance, I do not consider that the grant of the proposed licences is likely to interfere with these sites.

[62] Nevertheless, consistently with my findings in *Allarrow*, I do find that, given the concentration of sites and jukurrpa and the presence of *ngulu* areas within Kanakutul [*sic*], inadvertent interference is a distinct possibility. The Government party contends that there is no evidence that the native title holders regard mere access as interference. Rather, the Government party submits that the evidence indicates that the native title party's concern is not access *per se*, but that unsupervised strangers may go on to cause damage or get sick (GVP Response, para 93). On this basis, the Government party argues that, given the native title party has been offered (and has rejected) the RSHA, and the RSHA provides for consultation, the native title party's contention that access cannot occur without consultation is in fact an argument that access cannot occur without consultation on its terms (GVP Response, para 100). Two points need to be made here. First, the Government party's characterisation of the evidence is excessively narrow. The evidence clearly indicates that those responsible for the area have an obligation to ensure that people do not access areas which they are not authorised to enter in accordance with traditional law and custom. If that obligation is breached, those responsible for the area may be subject to traditional punishment. Second, the RSHA only provides for consultation in relation to ground disturbing activities and does not require the grantee party to consult with the native title party in relation to non-ground disturbing activities. In this respect, I accept the native title party's contention that unauthorised access could result in the kind of interference contemplated by s 237(b).

[63] The Government party contends that the grantee party is aware of its obligations under the AHA and has demonstrated its willingness to consult with the native title party by offering to enter into an RSHA with the native title party. However, as the RSHA only requires the grantee party to consult with the native title party in relation to ground disturbing activities and mere access is unlikely to contravene s 17 of the AHA, it is unlikely that compliance with the regulatory regime will reduce the risk of interference to Kanakutul [*sic*]. The grantee party states that it has entered into heritage agreements with other native title claimants and has altered access tracks and eliminated or altered the sites of drill holes to avoid interference with Aboriginal sites as a result of surveys conducted pursuant to those agreements. Nevertheless, the agreement which the grantee party proposes to enter into with the native title party does not provide a mechanism for consulting the native title party in relation to access and so is unlikely to reduce the risk of interference. I acknowledge that the grantee party has undertaken to avoid interference with Aboriginal sites on the proposed licences. However, the grantee party has not outlined how it intends to do so in the present circumstances. I note in this regard that the access tracks which the grantee party has identified pass directly through the area in question, even though Kanakutul [*sic*] is recorded on the DIA register and classified as a 'closed' site. As I observed in *Geotech*, it is incumbent upon the grantee party to provide evidence about how interference with sites of particular significance can be avoided. In this case, I do not consider that the grantee party has done so to the requisite degree. I accept that the grantee party has been put on notice about Kanakutul [*sic*] through the DIA Register and the material presented in this inquiry; however, I am not satisfied that the grantee party will be able to avoid interference with the site without consulting the native title party.

[129] On the basis of the evidence before the Tribunal in *Mungarlu Ngurrarankatja Rirraunkaja v Zenith Minerals*, the Government party accepts that Kanatukul is an area of particular significance. The Government party also accepts that the ceremonial site referred to by Member O'Dea is a site of particular significance to the native title holders (GVP Contentions, paragraph 130). However, the Government party also

seeks to rely on the Tribunal's findings in *Mungarlu Ngurrarankatja Rirraunkaja v Zenith Minerals* regarding the significance of the Katjarra/Carnarvon Ranges area and the relationship between Kanatukul and sites to the north. In the Government party's submission, the evidence relied on in the present case regarding the connection between Kanatukul and places within E69/2722 is deficient in a similar manner to that identified by Member O'Dea. In particular, the Government party's submits that there is no evidence which discusses the underlying significance of that connection (GVP Contentions, paragraphs 122-123).

[130] The Tribunal is not bound by its previous decisions (see *Re Smith* at 305; *Mt Gingee Munjie Resources v Victoria* at [20]). The Tribunal may, in its discretion, adopt any report, findings, decision, determination or judgment of the Tribunal, a court, a recognised State or Territory body or any other person or body (s 146 of the Act). The Tribunal is also entitled, as an administrative decision-maker, to have regard to evidence that has been given in another proceeding, provided the evidence is relevant (*Weld Range Metals v Western Australia* at [149], citing *Re a Solicitor* at 77, *Cadbury UK v Registrar of Trade Marks*). However, while I am entitled to have regard to and give weight to previous decisions of the Tribunal where relevant, I am required to consider the entirety of the evidence before me in the present proceedings (see *Karajarri Traditional Lands Association v ASJ Resources* at [14]).

[131] In the present matter, I have had the benefit of additional affidavit material which has shed further light on the issues under consideration. On the other hand, it has also been necessary to have regard to the fact that the proposed exploration will be undertaken by a different grantee party, and there is a considerable amount of material currently before the Tribunal in relation to the policies and procedures adopted by the grantee party in relation to Aboriginal heritage. Therefore, while I have considered and given considerable weight to the findings of Member O'Dea, it has been necessary to have regard to the evidence before me in reaching my conclusions.

Relevance of the AHA and RSHA to s 237(b)

[132] The first native title party contends that the AHA is not a complete answer to the question of whether the proposed licences are likely to interfere with areas or sites of particularly significance to the native title holders. In particular, the first native title

party submits that the places to which the AHA applies is more restrictive than the terms of s 237(b), in that references to 'places' and 'sites' in s 5 of the AHA is intended to convey something that is geographically constrained to a particular point, whereas the use of the term 'area' in s 237(b) does not. The first native title party also submits that the concept of interference in s 237(b) is broader than the activities proscribed under s 17 of the AHA and, in any event, the grantee party may apply under s 18 for ministerial consent to damage or destroy a site (NTP Contentions, paragraphs 8.4-8.11; NTP Reply, paragraphs 5.5-5.13).

[133] I will return to the issue of whether or not an 'area of particular significance' must be something that is 'geographically constrained' to a particular point. For the present purposes, I note the observation of President Webb QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara 1* that the 'wide compass of applicability of the AHA to places and objects is well recognised' (at [119], citing *Young v Western Australia* at [36]-[37]). It may be accepted that the conduct mentioned in s 17 does not necessarily 'cover the field' of interference contemplated by s 237(b), and the Tribunal has acknowledged that the AHA will not provide adequate protection in every case (see for example *Crowe v Western Australia* at [89]; *Cherel v Faustus Nominees* at [81]-[91]). However, the Tribunal is entitled to give weight to the protective effect of the AHA, notwithstanding the existence of a ministerial discretion to authorise interference with Aboriginal sites (see *Parker v Ammon* at [33]-[38], [40]-[41]).

[134] The first native title party also contends that the RSHA is ineffective to prevent interference of the kind contemplated by s 237(b) and arguably operates to facilitate some kinds of interference by failing to require heritage surveys prior to any kind of exploration activity. In particular, the first native title party submits that the RSHA only requires the grantee party to consult with the native title holders prior to making an application under s 18 of the AHA, which the RSHA facilitates by requiring the native title holders to identify the precise nature, location and physical extent of sites. The first native title party also submits that the RSHA does not address circumstances where the disclosure of certain cultural information would be culturally inappropriate and may itself constitute interference, and fails to deal with circumstances where 'non ground disturbing activity' as defined in the RSHA could amount to interference for the purposes of s 237(b), especially in cases where access to or dealings with a

particular area or site are restricted on the basis of gender (NTP Reply, paragraph 6.8-6.13).

[135] I recently considered similar arguments in *Western Desert Lands v Teck Australia* and I adopt my findings at [108]-[112] of that decision. The Tribunal is entitled to have regard to a grantee party's attitude to the RSHA in assessing the likelihood of interference with areas or sites of particular significance to the native title holders. The Tribunal may also have regard to any proposal on behalf of the Government party to impose a condition requiring the grantee party to enter into an RSHA with the native title party as a minimum standard available to the native title party (see *Champion v Western Australia* at [32]-[34]). There is no such proposal in the present case. Nevertheless, whether the 'minimum standard' created by the RSHA will be adequate to ensure that interference with areas or sites of particular significance is unlikely to occur will depend on the evidence. This is particularly so in circumstances where the evidence suggests that interference may arise from activities that would otherwise be regarded as low impact and would not trigger the requirement for a heritage survey under the RSHA (see *WF v Tropical Resources* at [73]-[74]).

What constitutes interference for the purposes of s 237(b)

[136] The Government party submits that, based on a plain reading of s 237(b), the word 'interfere' must be determined objectively and not from the point of view of the native title party's traditions. The Government party says this issue is currently before the Federal Court on appeal from the Tribunal's determination in *Yindjibarndi Aboriginal Corporation v FMG Pilbara 2* (GVP Contentions, paragraph 114). The grantee party also contends that the likelihood of interference must be assessed according to the ordinary meaning of the word and not by reference to the traditions of the native title party. The grantee party further contends that the interference must be substantial in effect and says the comments of French J (as he then was) in *Smith v Western Australia* at [27] on the meaning of the word 'interfere' in s 237(a) are of general application. In the grantee party's submission, this would also require the Tribunal to undertake a contextual evaluation of the risk of interference with areas or sites of particular significance. Moreover, the grantee party contends that any interference must relate to the significance of the area or site rather than to people or activities and,

as ‘sites’ and ‘areas’ have physical form, will ordinarily be physical (GP Contentions, paragraph 4.6).

[137] In reply, the first native title party submits that the contention of the Government party and the grantee party that inference must be physical and determined objectively or without reference to traditional law and custom should not be accepted. The first native title party points to the existence of a significant number of Tribunal decisions that recognise the likelihood of interference of the kind at issue in this inquiry and says the suggestion that all sites or areas of particular significance have physical form is an overly narrow and inaccurate view of traditional law and custom (NTP Reply, paragraphs 8.15(c), 8.21(c), 8.27(c)).

[138] The Federal Court has since handed down judgment in the appeal from *Yindjibarndi Aboriginal Corporation v FMG Pilbara 2* (see *FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation*). It is convenient here to set out the relevant passages from the reasons of McKerracher J:

> 64 The first ground advanced for the State was that the Tribunal erred in law by failing to undertake a ‘predictive assessment’ as to whether the ‘acts’ (the grants of the tenements) would be likely to interfere with areas or sites of particular significance to the native title party in accordance with their traditions.
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> 65 By way of summary of the State’s position, it does not (on appeal) challenge the Tribunal’s findings of facts as to the existence of sites of particular significance on E47/1667 or E47/1666. However, the State contends that the Tribunal erred by misconstruing and misapplying the legal test required under s 237(b) NTA. In particular, the State’s primary argument is that the Tribunal failed to carry out a ‘predictive assessment’ as required and misinterpreted the word ‘interfere’ such that there was no actual assessment of the risk of interfere with areas or sites in accordance with s 237(b) NTA. Further or in the alternative, the thresholds used in the assessment were, according to the State, impermissibly low. The State argues that those are matters of statutory interpretation properly falling within an appeal under s 169(1) NTA.
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> 66 The State relies on the Full Court Decision of *Little v Oriole Resources Pty Ltd* (2005) 146 FCR 576 in which the Full court adopted (at [49]) the discussion concerning the need for the Tribunal to reach a ‘predictive assessment’ as initially explained by French J (as his Honour then was) in *Smith* where his Honour said (at [23]):
>
> > … It was submitted that the [1998] amendment to s 237 reflected a legislative intention to require a predictive assessment of the effects of the proposed future act in accordance with the approach taken by Carr J in the *Ward* case, rather than that adopted by the Full Court in *Dann*. In my opinion that is the plain intention behind the amendments to s 237 and that intention is effected by the language that has been used. The Tribunal is therefore required to assess whether, as a matter of fact, the proposed future act is likely to give rise to the interference or disturbance referred to in pars (a), (b) and (c) of s 237. **That involves a predictive assessment not confined to a consideration of the legal rights conferred by the grant of the proposed tenement …** (emphasis added)

67 As far as the meaning of the word 'interfere' in s 237(b) is concerned, the State also rely on the observations of French J in *Smith* (at [26]) where his Honour said:

> The criterion of direct interference in par (a) may be thought of more fruitfully as functional than as definitional. That is to say, it is more usefully regarded as a direction to the Tribunal about its approach to an **essentially evaluative** judgment than as a definition of a class of consequence which, if attaching to a future act, would take it outside the scope of the expedited procedure. **This direction to the Tribunal does not require precise and semantically correct cause and effect analysis in every case. Simple causal analysis in this context would rarely yield a primary cause and effect with no other cause intervening. The notion of direct interference involves rather an evaluative judgment that the act is likely to be a proximate cause of the apprehended interference. And the concept of interference is to some degree evaluative. It must be substantial in its impact upon community or social activities. That is to say trivial impacts or impacts which are not relevant to the carrying on of the community or social activities are outside the scope of the kind of interference contemplated by the section.**
> (emphasis added)

68 Although those observations related to s 237(a) NTA, they would equally apply to s 237(b) NTA. It is clear that the interference must be substantial and must produce an 'impact' of some sort in relation to the activities referred to in s 237(a) NTA.

69 The State argues that there are no authorities which suggest that the use of the word interference in relation to s 237(b) NTA is different than that in s 237(a) NTA, nor would it be expected that there would be such a difference. But it appears to me that the Full Court analysis in *Parker*, referred to above, illustrates that, in the context of s 237(b) NTA, that it is the interaction of the proposed activities taken at large with the particular site having regard to the nature of the site which will determine whether there is interference in the sense used in subsection (b).

70 The State particularly emphasise that a threshold of substantial, or at least non-trivial impact, is consistent with the purpose of the expedited procedure and the right to negotiate. The State contend that the right to negotiate is a right which arises in circumstances where there is a significant threat to native title rights and interests, as the application of the right to negotiate would be illogical and contrary to the objects of the NTA in circumstances where it was no required to avoid significant impacts on native title rights and interests. It would be illogical for there to be a right to negotiate if the likely impact was only trivial. It also follows that interference for the purpose of s 237(b) must be with the area or site itself, not with people or activities which are the subject of s 237(a) NTA. The State argues that this would suggest that the relevant impacts or effects would ordinarily be physical, such that the onus would ordinarily be on the native title party to demonstrate how a substantial or non-trivial physical impact on an area or site will result.

71 The State complains that the Tribunal did not explicitly consider, and made no findings about the nature of the likely impact or effect of FMG's proposed activities on any of the areas or sites, including whether and how the significance of any of the sites would be diminished by the proposed activities. According to the State, no examples were drawn upon by the Tribunal to illustrate how the sites might be affected in even the smallest way. The State complains that the Tribunal failed to carry out a fact based risk assessment as required by the Full Court in *Little*, and failed to consider relevant factors mandated by the word 'interfere'.

72 Further, or alternatively, the State contends that the Tribunal considered that trivial impacts, or impacts which did not affect the significance of areas or site [*sic*], were sufficient to engage s 237(b) NTA.

73 In the event that it is found that the Tribunal did carry out a predictive assessment, the State then argues that the Tribunal failed to apply the correct standard of probability, namely, a 'real chance or risk' of interference. It merely found that 'inadvertent interference may occur'.

> 74 Dealing with the latter point briefly, taking the conclusion reached by the Tribunal entirely in context, it appears to me that it has applied the correct standard and, more particularly, that the sense in which it used the words 'may occur' was entirely consistent with there being a 'real chance or risk' in its assessment.
>
> 75 Dealing with the more substantive point, in my view, the nature of interference referred to under s 237(a) NTA is not the same as the nature of interference referred to under s 237(b) NTA. The risks addressed in the two subsections are quite different. The range of community and social activities referred to in s 237(a)N TA is very broad, whereas s 237(b) NTA is directed only at areas or sites of '*particular significance*'. It follows that interference that may be trivial in the context of a social activity may be substantial in the context of a site of 'particular significance'. That is why the focus in s 237(b) is to interference with 'areas or sites of particular significance' in accordance with the native title party's traditions. It follows, of course, that interference may appear trivial to a person not a member of a native title party for the purpose of s 237(b) NTA, may be substantial having regard to the native title party's traditions. This, as suggested in *Parker*, may require an evaluation of the extent of particular significance of the site.
>
> 76 As to the contention for the State that the interference will ordinarily be physical, this is not expressly articulated in the legislation. There is no reference to physical interference and the word 'interference' is qualified by the expression '… in accordance with [the native title party's] traditions. It may follow that mere entry onto the site other than on supervised terms and conditions at one level could be regarded as being physical, but may from the native title party's perspective none the less be non-trivial interference.

[139] The reasons of McKerracher J appear to support the argument advanced by the grantee party that French J's remarks in *Smith v Western Australia* on the meaning of the word 'interfere' in s 237(a) apply equally to s 237(b). This not only suggests that the Tribunal's task under s 237(b) is evaluative in the sense identified by French J, but also implies that the impact on areas or sites must be substantial or non-trivial. However, as McKerracher J went on to say (at [79]), '[t]he meaning of these terms must be taken in the context of the particular site and the laws and customs in relation to that site.' Hence, impacts that might otherwise be considered trivial in the context of s 237(a) could be regarded as substantial in the context of the native title party's traditions.

[140] It is clear then that the likelihood of 'interference' in s 237(b) is to be evaluated by reference to the traditional laws and customs of the native title party. It is also clear that interference must be with the area or site itself rather than with people or activities. However, McKerracher J also suggests that the interference need not be physical in nature. Rather, the focus of s 237(b) is whether the proposed future act is likely to interfere with the area or site under the traditional laws and customs of the native title party.

[141] Although the issue was not before the Federal Court in *FMG Pilbara v Yindjibarndi Aboriginal Corporation*, it appears to me that the interference must nevertheless relate to a physical area or site. Relevantly, the *Macquarie Dictionary* defines 'area' as '1. Any particular extent of surface; region; tract … 2. a piece of unoccupied ground; an open space ….' Similarly, 'site' is defined as '1. the position of a town, building, etc, especially as to its environment … 2. the area on which anything, as a building, is, has been or is to be situated.' In this sense, the words 'area' and 'site' both convey spatial qualities. It follows that an area or site of particular significance must have a physical dimension. The two concepts might be distinguished on the basis that a site could be said to refer to a defined point or position whereas an area implies something larger in extent and could include one or more sites. It may be difficult to determine precisely in a given case whether something is either an area or a site. It will often be a matter of perspective. Nevertheless, in my view an 'area' or 'site' must be capable of definition by reference to geospatial criteria. While this is unlikely to be an issue in most cases where an area or site has been identified, it seems to me that general spiritual or cultural concerns which do not relate to a specified area or site would not be covered under s 237(b).

Consideration of s 237(b)

[142] On the basis of the evidence before the Tribunal in the present matter, I accept and adopt the findings of Member O'Dea in *Mungarlu Ngurrarankatja Rirraunkaja v Zenith Minerals* regarding the particular significance of Kanatukul. I also find that the ceremonial site is a site of particular significance. Furthermore, I accept that the evidence establishes that the Katjarra or Mt Methwin area, which includes Katjarra Rockhole and Virgin Springs, is an area of particular significance to the native title holders. I also accept that the ceremonial site near Talbot Rockhole and the site to the east of Blue Hills are sites of particular significance.

[143] I also accept and adopt the finding of Member O'Dea that the Katjarra/Carnarvon Ranges area is not an area of particular significance according to the traditions of the native title holders. Although it is clear that the Katjarra/Carnarvon Ranges area is important to members of the first native title party, the evidence does not in my view establish the particular significance of the area. In my opinion, the better view is that Kanatukul and Katjarra/Mt Methwin are both areas of particular significance.

Although the evidence suggests they are linked, I agree with Member O'Dea that these areas are more appropriately characterised as discrete 'sites' rather than a single area extending from Lake Kerrlyn to the north of E69/2722 through Kanatukul and east to Blue Hills.

[144] Based on the evidence before me, I find that there are sites within the Kanatukul and Katjarra/Mt Methwin areas to which access or entry is restricted to people of a certain gender or status. I also accept that similar restrictions apply to the ceremonial site near Talbot Rockhole. In my view, a breach of these restrictions may amount to interference for the purposes of s 237(b).

[145] Mr Weaver states that it is the policy of the FMG Group (including the grantee party) not to undertake ground-disturbing activities without a heritage survey having first been undertaken. I also note that the grantee party's Heritage Guidelines indicate that all personnel are instructed to remain on existing roads and tracks. Furthermore, the Heritage Guidelines provide that access to areas where ground disturbance has been approved may only be accessed using existing tracks or those established during earlier approved works and that personnel are not permitted to enter an Aboriginal site without proper authorisation by FMG Group's heritage department. The Heritage Guidelines also make provision for areas to be classified as 'Heritage Restriction Zones.' As part of this classification, an area may be designated as being 'access restricted', 'no ground disturbance permitted', 'Non-standard GDP conditions apply', 'further consultation required' or 'further survey/investigation required'.

[146] While it is appropriate to give weight to these guidelines and the policies and procedures adopted by the grantee party, I am not satisfied they will ensure there is no real risk of interference with the sites within the Kanatukul and Katjarra/Mt Methwin areas. While the Heritage Guidelines contemplate that areas may be designated as Heritage Restriction Zones, there is no indication in the present matter that the grantee party is prepared to extend this designation to the Kanatukul or Katjarra/Mt Methwin areas. Although the grantee party states that it endorses the principles in the DMP Guidelines, it does not appear to have made any unequivocal offer to enter into an RSHA with any of the native title parties. In any case, the consultation process outlined in the RSHA only comes into play once the grantee party proposes to undertake ground disturbing activities as defined by the RSHA. While the RSHA also

requires the grantee party to notify the native title party in relation to non-ground disturbing activities, I am not satisfied this would be sufficient to reduce the risk of interference. I accept that the grantee party intends to comply with the AHA. However, the evidence in this matter suggests that activities that may not otherwise contravene the AHA may amount to interference with areas or sites of particular significance in accordance with the traditions of the native title party. In the circumstances, I accept there is a real risk of interference of the kind contemplated in s 237(b).

[147] In conclusion, I find that s 237(b) is satisfied in relation to E69/2727 but is not satisfied in relation to E69/2722 and E69/2726.

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

Contentions and evidence in relation to s 237(c)

[148] In relation to s 237(c), the first native title party contends that the grant of the proposed licences is likely to involve major disturbance to the land concerned or create rights whose exercise is likely to involve major disturbance to that land. This contention is made on three levels. First, it is submitted that the land which is subject to the proposed licences is regarded as part of a wider area of cultural and environmental significance to the native title holders. Second, the first native title party submits that the land is pristine but also fragile. In particular, the first native title party submits that the area is largely unexplored by miners and undeveloped, contains threatened species and is under threat from introduced species and erosion. Third, the first native title party relies on the fact that the proposed licences and surrounding areas have been given an IUCN Category III protected area status under the IPA declaration. The first native title party says that this status requires the native title holders to actively maintain and enhance the cultural and environmental values of the area (NTP Contentions, paragraphs 12.1-12.3, 15.1-15.3, 18.1-18.3).

[149] Mr Thomas states that the IPA is a voluntary agreement entered into between the native title holders and the Commonwealth government and resulted in the determination area becoming part of the national reserves system. According to Mr Thomas, the first native title party consulted with native title holders prior to the IPA declaration to determine whether any areas within the determination area were

'worthy of higher levels of protection' under the IPA. As a result of that consultation process, the native title holders agreed to manage the Katjarra/Carnarvon Ranges area in accordance with the objectives of the IUCN Category III protected area status. Mr Thomas describes the area subject to the IUCN Category III protected area status as follows:

> a large area that stretches from Lake Kerrlyn in the north to the western and southern boundaries of the determination area and east to Well 5 on the Canning Stock Route (including the area shown as "Blue Hills" on topographic maps). This includes the area between and around the two sets of ranges, the northern range, that includes Mt Methwin and Virgin Springs (in part within E69/2722) and the southern range, shown on some topographic maps as "Carnarvon Range" (in part within E69/2726), and the former Blue Hills pastoral station (within E69/2726 and E69/2727)…

[150] According to Mr Thomas, the protected area status 'recognises the area as being of high cultural and conservation value'. Mr Thomas states that he is aware, through his experience in a previous role at CALM, that an area similar in extent to the Katjarra/Carnarvon Ranges area was identified for possible reservation, but was not pursued as a result of feedback received in the regional planning process, which included 'the importance of the area from a cultural perspective' (RMT Affidavit, paragraphs 4-7).

[151] Mr Farmer states that the area is 'largely previously unexplored and un-developed'. Though Mr Farmer says there has been pastoral activity in the southern parts of E69/2726 and E69/2727, he states that the pastoral lease was owned and managed by a Putijarra man, who 'managed the area consistent with Putijarra law and values.' According to Mr Farmer, the lease has now been cancelled and the area 'has returned to its pre-pastoral days.' Mr Farmer states that even low level exploration activities, such as creating new tracks, soil or rock sampling or camping outside of designated camping areas 'would be inconsistent with attempts by Putijarra to maintain and adhere to the IUCN Category III status' (DAF Affidavit, paragraphs 40-41).

[152] Mr Farmer says there are 'a considerable number and diversity of cultural, natural resource management and social activities, coordinated by [the first native title party] and undertaken by native title holders through the Birriliburu rangers and others over the Katjarra IUCN Category III protected area' (DAF Affidavit, paragraph 8). Although these activities also feature in other areas of the IPA, Ms Drake attests to their particular prominence in the Katjarra/Carnarvon Ranges area due to the nature of

the landscape (EGD Affidavit, paragraph 7). Mr Thomas also states that the southwest region of the determination area, which includes the Katjarra/Carnarvon Ranges area, is 'a particular focus' for these activities (RMT Affidavit, paragraph 27). In terms of conservation and land management, these activities include the monitoring of threatened and introduced flora and fauna; the implementation of baiting and hunting programs; cleaning rockholes; and strategic burning (RMT Affidavit, paragraphs 15-18; DAF Affidavit, paragraphs 32-35; EGD Affidavit, paragraphs 3-6).

[153] Mr Thomas states that restrictions on access to the Katjarra/Carnarvon Ranges area also have a land management function, as they assist the native title holders to maintain the environmental and cultural values of the area and protect the fragile desert ecosystem. In particular, Mr Thomas notes the threat of introducing non-native weeds and grasses, which can be inadvertently carried into the area by motor vehicles and people. Mr Thomas also deposes that tracks in the area are designed and maintained to ensure they do not cause unintended erosion, and people who enter the area are required to keep to established tracks to ensure that additional tracks are not created by vehicle use (RMT Affidavit, paragraph 21).

[154] The Government party contends the alleged 'pristine' and 'fragile' nature of the land and the area's IUCN status does not mean major disturbance is more likely to occur, particularly where the proposed future act is simply an exploration licence. The Government party also contends that E69/2722 and parts of E69/2726 and E69/2727 will be subject to particular conditions in respect of the area of land designated as Proposed Conservation Park 153 ('PCP/153'). The Government party states that these conditions require the licensee to consult with the Environmental Officer of DMP prior to accessing the area covered by PCP/153 and all vehicles and equipment are required to be washed down to remove soil and plant propagules prior to entering the relevant areas (GVP Contentions, paragraphs 145-146, 150-152).

[155] The Government party also notes that the conditions require the licensee to prepare a detailed program for each phase of the proposed exploration for written approval by the Director, Environment, DMP, prior to entering PCP/153 for exploration purposes. The Director is then required to consult with the Regional or District Manager of the Department of Environment and Conservation or other government agency before giving approval. The Government party states that the program must describe the

environmental impacts and programs for their management and include, among other things, procedures to protect the integrity of special ecosystems, details of water requirements and refuse disposal, and proposals for the instruction and supervision of personnel and contractors in respect to environmental conditions (GVP Contentions, paragraph 147).

[156] In the Government party's submission, the conditions to be imposed in relation to environmental protection, together with the grantee party's protocols as to heritage protection, are a complete answer to the contentions of the first native title party in respect of areas designated as PCP/153. However, the Government party further submits that the proposed licences are not likely to involve major disturbance for the following reasons:

(a) The grantee party has stated that it has a policy not to undertake ground disturbing activities without a heritage survey having first been undertaken. Accordingly, any ground disturbing activities are intended to be conducted in a way which will not involve major disturbance.

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

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

(d) The proposed licence areas have been subject to prior mineral exploration and pastoral activity and the activities contemplated by the grantee party would be the same as, or no more significant than, the previous and continuing use of the areas.

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

[157] In reply, the first native title party contends that there have been no discussions between it and the Government party about establishing PCP/153 as a conservation area or park and there is no evidence that the Government party has actively managed the area or enforced conditions placed on exploration tenements. In this respect, the first native title party notes the findings of the Auditor General with respect to the enforcement of and compliance with environmental regulations and conditions (see Office of the Auditor General of Western Australia, *Ensuring Compliance with Conditions on Mining* (September 2011)). Specifically, the first native title party refers to the following passages at page 8 of the report:

> Monitoring and enforcement of environmental conditions need significant improvement. Currently, agencies can provide little assurance that the conditions are being met …
>
> Significant weaknesses in information management make it difficult for DMP to analyse the effectiveness of its inspections, or report accurately on how well operators comply with conditions. Information that is kept is inconsistent and the systems used to manage information are inefficient …
>
> DMP's approach to enforcing environmental conditions is to take the minimum action required to obtain industry cooperation and compliance

[158] I note that the Auditor-General concluded that the DMP's approach to enforcing environmental conditions 'can be effective', though it identified weaknesses which needed to be addressed. These included the lack of clear established criteria for determining the severity of non-compliance and the DMP's monitoring of whether action had been taken to address identified non-compliance.

[159] The first native title party also contends that the grantee party's policies regarding the conduct of heritage surveys are irrelevant to the issues arising under s 237(c), as the policies are directed to the management of cultural heritage rather than ensuring that its activities do not involve major disturbance to areas of environmental significance. Furthermore, the first native title party contends that activities which do not involve ground disturbance, such as access for the purposes of rock chipping and soil sampling are likely to cause erosion or result in the introduction of flora into the area (NTP Reply, paragraphs 9.3-9.5).

Consideration of s 237(c)

[160] The issue of whether the proposed licences are likely to involve, or create rights whose exercise is likely to involve, major disturbance is determined by reference to the expectations of the entire community (see *Little v Oriole Resources* at [52]-[54]). While the Tribunal must have regard to the particular concerns of the Aboriginal community and the local population, including matters such as community life, customs, traditions and cultural concerns, the Tribunal is only entitled to take these matters into account to the extent that they flow from actual physical disturbance arising from the exercise of rights granted or created by the proposed future act (see *Dann v Western Australia* at 394, 401 and 413; *Rosas v Northern Territory* at [84]; *Lockyer v Mineralogy* at [67]).

[161] The Tribunal has generally found that mineral exploration is unlikely to involve major disturbance to land and waters (see *Champion v Western Australia* at [77]; *Yindjibarndi Aboriginal Corporation v FMG Pilbara 1* at [143]). However, the Tribunal must have regard to the overall circumstances including the nature of the locality and the regulatory regime in place (see *Champion v Western Australia* at [77]). Hence, in *Re Nyungah People*, the Tribunal concluded that the grant of a petroleum exploration permit was likely to involve major disturbance where there was a real risk that seismic exploration could occur within an area designated as State forest. Similarly, in *Western Australia v Britten*, the Tribunal found that the proposed grant of an exploration licence over part of a water catchment that was relied on by traditional owners did not satisfy s 237(c).

[162] In the present case, the proposed licences are situated in an area designated as a IUCN Category III protected area under the terms of the IPA. The Tribunal has previously found that the existence of a national park or National Heritage Listing is not determinative of whether major disturbance is likely to occur (see *Rosas v Northern Territory* [93]-[100]; *Goonack v Geotech International* at [44]; *BW v Baxter* at [60]). In *Rosas v Northern Territory*, the Tribunal accepted that, while the existence of a national park is potentially of relevance to s 237(c), it does not raise a presumption that exploration activity is likely to result in major disturbance to land and waters. In that matter, Member Sosso gave particular weight to the fact that, under the relevant legislation, a national park could be declared for a variety of public policy reasons and

was not necessarily an indication of the area's environmental significance. However, Member Sosso noted that, if (a) there is evidence that land is part of a national park or reserve and is undisturbed (and which may have high environmental values); and (b) there is evidence that the exploration proposed (or previous exploration) has (or had) the potential to significantly disturb the vegetation and soil of the area; then it would be open for the Tribunal to infer that there is a likelihood of major disturbance (see *Rosas v Northern Territory* at [96]).

[163] There is little evidence before the Tribunal regarding the criteria for designating land as an IUCN Category III protected area. There is also little in the way of evidence regarding the process for designating such an area, apart from the evidence of Mr Thomas that native title holders were consulted about areas requiring a higher level of protection under the IPA and the fact this appears to have been accepted by the Commonwealth for the purposes of the IPA declaration. It is not clear what consequences flow from the protected area status, though it was suggested that it imposes certain obligations on the native title holders in relation to the area's management. Nevertheless, it is appropriate to give some weight to the designation as recognising the cultural and environmental values of the Katjarra/Carnarvon Ranges area. These cultural and environmental values are amply supported by the evidence presented in this matter and it is clear that the native title holders have invested a considerable amount of time and effort towards maintaining these values within the framework of the IPA.

[164] In the circumstances, I consider there is a real risk that mineral exploration could involve major disturbance to the land. However, I accept that this risk will be mitigated by the imposition of conditions proposed by the Government party in relation to PCP/153. These conditions require the grantee party to prepare a detailed program for each phase of exploration for approval by the Director, Environment, DMP. The Director must consult with the Department of Environment and Conservation or other relevant agencies prior to approval. The program must describe the environmental impacts and programs for management, including procedures for protecting the integrity of special ecosystems and proposals for instructing and supervising personnel and contractors in relation to environmental conditions. The conditions also require the grantee party to wash down all vehicles and equipment

prior to entering the area to prevent the propagation of plants and soil-borne diseases. In my view, it is appropriate to give weight to these conditions.

[165] The first native title party contends that the Government party has failed to produce any evidence of active management or the enforcement of conditions in relation to PCP/153. It is not clear what significance the first native title party is seeking to attach to the Government party's failure to produce evidence of active management of PCP/153 in the context of the grant of an exploration licence or how it is relevant to the issues considered under s 237(c). In the context of the proposed licences, the Government party has decided to impose additional conditions in relation to areas within PCP/153. The first native title party says the Government party has failed to produce evidence that it has enforced these conditions in the past. However, as Member O'Dea observed in *Barnes v Pirkopf* at [31], the effectiveness of these regulatory measures does not necessarily require universal compliance by enforcement of those measures. Although the Auditor-General's report identified weaknesses in the monitoring of conditions on mining projects, this does not mean the grantee party is likely to contravene the conditions imposed on the licences (see *Karajarri Traditional Lands Association v ASJ Resources* at [50], *Barnes v Pirkopf* at [27]-[31] and *Mungarlu Ngurrarankatja Rirraunkaja v Zenith Minerals* at [37]-[44]). In any event, I note that a follow-up to the Auditor-General's report published in November 2014 found there had been 'significant improvement by government and agencies in addressing the issues we identified in 2011' (Office of the Auditor General of Western Australia, *Ensuring Compliance with Conditions on Mining – Follow-up*, November 2014 at 5).

[166] There are however significant areas within E69/2726 and E69/2727 which will not be subject to these conditions. Although a portion of E69/2727 is subject to the Canning Stock Route, there remains a significant portion of the area which is not within the Canning Stock Route or PCP/153. In my view, the standard conditions requiring rehabilitation of disturbances and written authorisation prior to the use of mechanised equipment will not be sufficient to ensure there is no real risk of major disturbance to the land within E69/2726 and E69/2727. I accept that the grantee party's policy is to carry out a heritage survey prior to undertaking ground disturbing work, and this is likely to extend to the establishment of new tracks given the Heritage Guidelines

provide that existing tracks must be utilised unless authorised under the GDP Procedure. However, I do not accept that the consultations which are likely to occur in the context of a heritage survey will necessarily be adequate to address any environmental issues that might arise from the proposed exploration.

[167] The Government party suggests that the proposed exploration will be the same as or no more substantial than the previous and continuing use of the area. It appears to me that there has been at most a limited history of exploration in these areas. Although there has been pastoral activity over parts of E69/2726 and E69/2727, I accept that the area has recovered to some extent since the cancellation of the historical lease. In any case, I do not accept that exploration will necessarily involve an equivalent degree of disturbance.

[168] In conclusion, I find that E69/2726 and E69/2727 are likely to involve major disturbance to the land and waters concerned. However, I find there is no real risk of major disturbance arising from the grant of E69/2722.

Determination

[169] The determination of the Tribunal is that the grant of exploration licences E69/2722, E69/2726 and E69/2727 to FMG Pilbara Pty Ltd are not acts attracting the expedited procedure.

Mr JR McNamara
Member
4 February 2015