NATIONAL NATIVE TITLE TRIBUNAL

Tarlka Matuwa Piarku Aboriginal Corporation RNTBC v FMG Resources Pty Ltd and Another **[2015] NNTTA 5 (5 February 2015)**

Application No: **WO2013/0878**

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

- and -

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

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

- and -

FMG Resources Pty Ltd (grantee party)

- and -

The State of Western Australia (Government party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Mr JR McNamara, Member
Place: Brisbane
Date: 5 February 2015

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – gender-restricted evidence – non-disclosure directions – failure to annex maps to affidavits – relevance of grantee party's intentions – whether act is likely to interfere directly with the carrying on of community or social activities – no evidence of community or social activities – whether act is likely to interfere with sites of particular significance – Tribunal not satisfied that site located within or relevantly proximate to licence area – whether act is likely to involve major disturbance to land or waters – expedited procedure attracted

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

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

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

Cases:

Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Faustus Nominees Pty Ltd [2007] NNTTA 15 (‘*Cherel v Faustus Nominees*’)

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

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

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

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*’)

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

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

Les Tullock and Others on behalf of Tarlpa/Western Australia/Allarrow Pty Ltd [2011] NNTTA 118 (‘*Tullock v Allarrow*’)

Les Tullock and Others on behalf of Tarlpa/Western Australia/Kimba Resources Pty Ltd; WF (Deceased) & Ors on behalf of Wiluna/Western Australia/Kimba Resources Pty Ltd; Keith Narrier & Ors on behalf of Tjiwarl/Western Australia/Kimba Resources [2014] NNTTA 2 (‘*Tullock v Kimba 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*’)

Maitland Parker and Others on behalf of the Martu Idja Banyjima People/Western Australia/Iron Duyfken Pty Ltd [2010] NNTTA 60 (‘*Parker v Iron Duyfken*’)

Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation)/Western Australia/FMG Pilbara Pty Ltd [2015] NNTTA 4 (‘*Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara*’)

Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation)/Western Australia/FMG Resources Pty Ltd [2013] NNTTA 10 (‘*Mungarlu Ngurrarankatja Rirraunkaja v FMG Resources*’)

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

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

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

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

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

Wanjina-Wunggurr (Native Title) Aboriginal Corporation/Western Australia/Braeburn Resources Pty Ltd [2010] NNTTA 133 (‘*Wanjina-Wunggurr (Native Title) Aboriginal Corporation v Braeburn Resources 1*’)

Wanjina-Wunggurr (Native Title) Aboriginal Corporation/Western Australia/Braeburn Resources Pty Ltd [2010] NNTTA 150 (‘*Wanjina-Wunggurr (Native Title) Aboriginal Corporation v Braeburn Resources 2*’)

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

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

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

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

WF (Deceased) & Ors on behalf of the Wiluna Native Title Claimants/Western Australia/JML Resources Pty Ltd [2013] NNTTA 8 (‘*WF v JML Resources*’)

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

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

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

Representatives of the native title party:	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 8 April 2013, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E69/3120 ('the proposed licence') to FMG Resources Pty Ltd ('the grantee party'). The notice included a statement that the Government party considers the grant to be an act attracting the expedited procedure (that is, an act that can be done without the normal negotiations required by s 31 of the Act). In accordance with s 29(4)(a) of the Act, the notice specifies the 'notification day' as 10 April 2013.

[2] According to the notice, the proposed licence comprises an area of 90 graticular blocks (approximately 278 square kilometres) located 109 kilometres north-westerly of Wiluna in the Shire of Wiluna. The proposed licence is wholly situated within the Wiluna native title claim (WC1999/024 – registered from 24 September 1999). A conditional determination of native title was made in the Federal Court on 29 July 2013 (see *WF v Western Australia*) and Tarlka Matuwa Piarku Aboriginal Corporation was subsequently registered as the prescribed body corporate on 27 January 2015.

[3] 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.

[4] On 9 August 2013, the persons comprising the applicant in the Wiluna claim lodged with the Tribunal an objection to the inclusion of the expedited procedure with respect to the proposed licence. 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 native title party').

[5] At a preliminary conference held on 10 September 2013, the parties indicated to the Tribunal that they intended to negotiate an agreement that would lead to the withdrawal of the objection. The matter was adjourned to a status conference on 15 January 2014, at which point the parties requested further time to conclude the agreement. The matter was adjourned to another status conference on 19 February 2014, and then to a further status conference on 26 March 2014. At the 26 March conference, the parties indicated they were still negotiating the agreement. Consequently, the Tribunal issued directions for inquiry.

[6] In compliance with the directions, the Government party provided supporting documentary evidence on 14 May 2014 and the native title party provided a statement of contentions on 18 June 2014 ('NTP Contentions'). The native title party contentions were accompanied by a draft minute requesting directions to restrict the viewing of affidavit evidence which the native title party intended to file in support of its objection. The directions were requested on the basis that the affidavits were made by *wati* (initiated law men) on condition that no women would be made aware of their contents.

[7] In light of the native title party's request, I was appointed by President Webb QC to constitute the Tribunal for the purposes of conducting the inquiry into the objection application. On the basis of the draft minute, I 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.

[8] 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 a statement of contentions on 3 September 2014. The native title party provided a statement of contentions in reply on 24 September 2014, accompanied by the affidavit of Michael David Frith Allbrook affirmed 24 September 2014.

[9] I have considered the material provided to the Tribunal in relation to the objection 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

[10] Section 237 of the Act provides:

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

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

[12] In *Walley v Western Australia*, 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]).

[13] 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).

[14] 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]).

[15] On the interaction between s 237(b) and the site protection regime established under the *Aboriginal Heritage Act 1972* (WA) ('AHA'), I adopt the findings made by the Deputy President Sumner in *Parker v Ammon* at [31]–[38] and [40]-[41] and those of Member 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].

[16] 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 Act

[17] The Government party provides the following documents in relation to the proposed licence:

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

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

- A copy of the tenement application and Draft Tenement Endorsements and Conditions Extract.

- The instrument of licence and first schedule listing land included and excluded from the grant.

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

[18] The Tengraph quick appraisal establishes that the area within the proposed licence is subject to pastoral lease 3114/1049 (Cunyu). The quick appraisal also indicates that

the proposed licence area has previously been subject to 14 exploration licences granted between 1987 and 2007, overlapping the area at between 0.2 per cent and 27.2 per cent, with an average lifespan of four years. The area has also been subject to three temporary reserves granted between 1959 and 1977, overlapping at 1.8 per cent, 22.4 per cent and 100 per cent respectively, with an average lifespan of two years and nine months.

[19] The quick appraisal also records the following features within the proposed licence area: 13 tracks; seven fence lines; two yards; three wells/bores; three wells/bores with windmills; four non-perennial lakes; and 63 minor watercourses.

[20] The report from the DAA Database establishes the existence of two sites registered under the AHA:

- Site ID 2669: Tyinki-Tyinki – mythological
- Site ID 2670: Winpa – ceremonial, man-made, structure, mythological

Conditions and Endorsements

[21] 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 also be imposed:

> 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.
>
> **Consent to mine on Stock Route Reserve 1001 given subject to the following:**
>
> 7. No exploration activities being carried out on Stock Route Reserve 1001 which restrict the use of the reserve.

[22] I note that the proposed licence does not in fact encroach on the Canning Stock Route.

[23] 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.
3. The grant of this licence does not include the land the subject to prior Exploration Licence 69/1510. If the prior licence expires, is surrendered or forfeited that land may be included in this licence, subject to the provisions of the Third Schedule or the Mining Regulations 1981 title 'Transitional provisions relating to Geocentric Datum of Australia'.
4. The Licensee pursuant to the approval of the Minister responsible for the Mining Act 1978 under Section 111 of the Mining Act 1978 is authorised to explore for iron.

In respect to Water Resource management Areas (WRMA) the following endorsements apply:

5. The Licensee attention [*sic*] is drawn to the provisions of the:
    - Waterways Conservation Act, 1976
    - Rights in Water and Irrigation Act, 1914
    - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
    - Country Areas Water Supply Act, 1947
    - Water Agencies (Powers) Act 1984
    - Water Resources Legislation Amendment Act 2007
6. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.
7. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the DoWs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.

In respect to Artesian (confined) Aquifers and Wells the following endorsement applies:

8. The abstraction of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless a current licence for these activities has been issued by the DoW.

In respect to Waterways the following endorsement applies:

9. Advice shall be sought from the DoW if proposing any exploration within a defined waterway and within a lateral distance of:
    - 50 metres from the outer-most water dependent vegetation of any perennial waterway, and
    - 30 metres from the outer-most water dependent vegetation of any seasonal waterway.

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

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

[24] I note the quick appraisal indicates that E69/1510 has now been withdrawn.

Relevance of previous mining and pastoral interests

[25] The Government party and the grantee party both seek to rely on the existence of prior mineral exploration and pastoral interests in support of the contention that the proposed licence is not likely to interfere 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 area. Similarly, the grantee party contends that any impact arising from the proposed licence will be no greater than what has occurred in the past.

[26] The extent of previous mineral exploration interests in the proposed licence area is outlined above at [18]. The documents provided by the Government party indicate that 14 exploration licences have been granted over the proposed licence area since 1987, including several which covered significant portions of the proposed licence area and survived over a number of years. The latest of these tenements was E69/2183, having been granted in 2007 and surrendered in 2011, covering 26.7 per cent of the proposed licence area. Government party documents also indicate that the Cunyu pastoral lease covers the entire area affected by the proposed licence.

[27] In terms of the relevance of previous mining and pastoral interests to the predictive assessment required under s 237, I adopt my comments in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara* at [40]-[42]. Given the nature of interests involved, I accept that it is open to the Tribunal to infer that exploration and pastoral activity has occurred to some extent. In particular, I note that the terms of several of the previous licences exceeded five years, and it is likely that some activity has taken place in these areas. It is also possible to infer from the existence of the yards, wells, tracks and fence lines noted in the Government party documentation that the area has previously been, and perhaps continues to be, subject to the lawful activities of the pastoral leaseholder. Although it is not possible to determine the precise extent of these activities, I accept that the Tribunal may have regard to the existence of these interests

and the likely exercise of the rights created or conferred by these interests as part of the overall context.

Native Title Party Evidence

[28] Though the native title party's objection application addressed each of the criteria in s 237 of the Act, the native title party does not seek to pursue its objection in relation to ss 237(a) or 237(c). Therefore, the basis of the objection is that the grant of the proposed licence is likely to interfere with areas or sites of particular significance according to the traditions of the native title party pursuant to s 237(b).

[29] In support of its contentions, the native title party relies on the affidavits of Frankie Wongawol sworn 7 June 2014 ('FW Affidavit') and Darren Andrew Farmer affirmed 7 June 2014 ('DAF Affidavit'). As noted above at [6]-[7], directions have been issued in relation to the affidavits pursuant to s 155(1) of the Act. These directions require the documents to be used only for the purpose of these proceedings (including any appeal or judicial review proceedings) and remain confidential to male officers and legal representatives of each party and their respective employees and consultants and to male Tribunal Members and staff assisting the Tribunal.

[30] 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 affidavits 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 native title party.

[31] Mr Wongawol and Mr Farmer state that they are traditional owners for the Wiluna claim area. Mr Wongawol states that he is a *wati* and has cultural authority for the proposed licence area. Mr Farmer states that he is also a *wati* and can speak for the proposed licence area, though he notes that Mr Wongawol is 'one of the bosses for this country' and defers to Mr Wongawol in relation to cultural issues. I accept that Mr Wongawol and Mr Farmer are authorised to speak on behalf of the native title party in relation to the proposed licence area.

Failure to annex maps

[32] The grantee party notes that Mr Wongawol and Mr Farmer state that they were shown an A0 size map of the proposed licence by a staff member of Central Desert Native Title Services Ltd ('CDNTS'), but fail to: annex the relevant map to their respective affidavits; state any belief, or any basis for a belief, that the maps were correct; or state whether they were shown the relevant map days, weeks or months prior to swearing their affidavits. Accordingly, the grantee party submits that there is no basis to assume that any map viewed by Mr Wongawol or Mr Farmer correctly showed the location or extent of the proposed licence or any other feature which might have been on the map or that they know the location or extent of the proposed licence (GP Contentions, paragraphs 3.2-3.3).

[33] In support of this submission, 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.

[34] The grantee party endorses the approach adopted by Member O'Dea, but says that where a deponent has reviewed and referred to a map and 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.

[35] The Government party supports and relies on the grantee party's contentions in relation to the failure to annex the map (GVP Contentions, paragraphs 47-48).

[36] Subsequent to the filing of the Government party and grantee party contentions, the native title party provided the affidavit of Mr Allbrook. Mr Allbrook is a lawyer engaged by CDNTS and a representative of the native title party in these proceedings. Mr Allbrook deposes that he was in the town of Wiluna on 7 June 2014 to attend a meeting of the Wiluna claim group and showed an A0 size map of the proposed licence to Mr Wongawol and Mr Farmer. Mr Allbrook states that he has carried out a search of the files kept by CDNTS in relation to these proceedings and was unable to locate the exact copy of the map; however, he attaches to his affidavit an A3 replica of the map that he believes to be a scale replica of the map shown to Mr Wongawol and Mr Farmer on 7 June 2014.

[37] Although the Government party and the grantee party oppose the filing of Mr Allbrook's affidavit, I am satisfied that it is relevant to the matters to be determined and does not raise any new issues. On that basis, I am prepared to accept it. This is consistent with the approach of Member O'Dea in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Resources* at [7]. However, I am not satisfied that Mr Allbrook's evidence adequately addresses the issues raised by the grantee party and the Government party in relation to the affidavits of Mr Wongawol and Mr Farmer. In particular, I note that Mr Allbrook was unable to obtain the exact copy of the map shown to the deponents and has only been able to produce a document which he believes to be a scale replica of that map. Given the nature of the evidence provided by Mr Wongawol and Mr Farmer, this is not a trivial objection. In the circumstances, it is difficult to conclude with any certainty that the map shown to the deponents accurately depicted the location and extent of the proposed licence or other features which may have been shown on the map. This assumes particular importance in these

proceedings as the deponents refer to a site that cannot otherwise be identified by reference to other sources. As I observed in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara* at [61], the effect of such an omission on the weight given to a deponent's evidence will depend on the nature of the evidence provided. However, if there remains any uncertainty as to the location of an area or 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.

Grantee Party Evidence

[38] 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.

[39] 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 licence; and a map of the proposed licence produced by Fortescue.

[40] 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 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).

[41] Mr Weaver states that he is authorised by the grantee party to offer to enter into the RSHA with the native title party in respect of the proposed licence. 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 17).

[42] The s 58(1)(b) statement annexed to Mr Weaver's affidavit 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.

Relevance of grantee party intentions and the presumption of regularity

[43] 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 native title party states that the Government party has not provided evidence as to how it has reached this view and, as the relevant regulator, should produce evidence to support that assertion, such as evidence of FMG Group's consistent and continual compliance with tenement conditions (NTP Reply, paragraph 5.7-5.9).

[44] I recently considered this issue in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara* and adopt the comments I made there at [70]-[74]. In the present matter, I am not satisfied there is any basis for drawing an inference that the grantee party is unlikely to act in accordance with its stated intentions or fail to comply with legislative and other regulatory requirements. Although the evidence provided in relation to the grantee party's exploration program is of little assistance, it is appropriate to have regard to the policies, procedures and protocols adopted by the grantee party in performing the predictive assessment required under s 237.

Materials produced by the Tribunal

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

[46] The Government party indicated that it had no issue with the Tribunal relying on the map for the purposes of the determination. The grantee party declined to comment on the content of the map on the basis it would be used in conjunction with the materials provided by the parties. The native title party did not comment on the Tribunal's intended use of the map.

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

[47] As noted above at [28], the native title party makes no contentions in relation to community or social activities carried on in the proposed licence areas. There is no evidence before the Tribunal as to the carrying on of any community or social activities by members of the native title party. Therefore, I accept that the only conclusion open to the Tribunal is that the grant of the proposed licence is not likely to interfere with any community or social activities of the native title party.

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

Contentions and evidence in relation to s 237(b)

[48] The native title party contends that the proposed licence contains sites and areas of particular significance to the male members of the native title party, in accordance with their traditions (NTP Contentions, paragraph 3.17). In particular, the native title party submits that:

- there is a *jukurrpa* (dreaming track or songline) that is present in the proposed licence and which creates and transforms the landscape in ways that are not immediately apparent to people without the requisite cultural knowledge;
- sites located within the proposed licence are considered culturally secret and dangerous and should not be known by women or uninitiated men; and

- unauthorised disclosure of the nature of these sites may incur traditional sanctions or physical punishments.

[49] The native title party also contends that the area within the proposed licence is of particular significance to the native title party and people of the western desert generally. Further, the native title party contends that the nature of the country on, and surrounding, the proposed licence is such that any entry onto parts of the licence area or the surrounding country which has not been agreed with the native title party would likely result in interference within the meaning of s 237(b). In support of this contention, the native title party relies on the findings of Member O'Dea in *Tullock v Allarrow* at [40] and other matters regarding the nature of *jukurrpa* tracks. The native title party submits that the nature of *jukurrpa* is such that one part of the songline may cause interference to sites or areas located at other points along the songline and there are sites and areas within the proposed licence and surrounding areas that are considered secret and which should not be known by women or uninitiated men. In the native title party's submission, these sites and areas cannot be accessed or spoken about without a properly constituted group of people (NTP Contentions, paragraph 3.18-3.20).

[50] The native title party contends that the nature and number of sites and areas of particular significance within and around the proposed licence reduces the utility of an endorsement drawing the grantee party's attention to the AHA, as certain activities permitted by the licence may constitute interference for the purposes of s 237(b) but may not necessarily be prohibited by s 17 of the AHA. The native title party contends that meaningful consultation and negotiation is required on issues such as access and the impact of exploration in order to avoid inference and ensure the impact on the area is managed in accordance with the laws and customs of the native title party (NTP Contentions, paragraph 3.21-3.22).

[51] Mr Wongawol states that there is *jukurr* (dreaming) 'all along that country.' In particular, Mr Wongawol refers to a specific *jukurrpa* that is found in the proposed licence and which is associated with a particular hill. Mr Wongawol attests that the hill is 'a special place to the *wati*, and we have to protect it.' Mr Wongawol states that the *jukurrpa* 'would be hurt or damaged' if an explorer were to enter the proposed licence without the right Martu people and '[j]ust the wrong person walking around

could hurt or damage the *jukurrpa*, same with chipping at rocks.' Mr Wongawol also states that there may be consequences if someone were to '[walk] around and do the wrong thing, go to the wrong place' and or 'do the wrong thing' at the hill. In particular, Mr Wongawol states that women must avoid the hill and take a different route to men (FW Affidavit, paragraphs 8, 10-12, 14-15).

[52] Mr Farmer also refers to the *jukurrpa* and hill and the need to protect special places in Martu country. In relation to the hill, Mr Farmer attests (at DAF Affidavit, paragraph 10) that:

> if a mining company wants to come out to that place at [the hill] and the areas around it, then we need to make sure that they stay away from the really special places. We need to mark out areas around [the hill] where they can't go so we keep the [*jukurrpa*] strong.

[53] Mr Farmer states that he does not think any mining companies have been to the areas around the hill because 'that place is still strong for us Martu' (DAF Affidavit, paragraph 10).

[54] The grantee party disputes that the hill referred to in the affidavits of Mr Wongawol and Mr Farmer is within, or relevantly proximate to, the proposed licence. The grantee party notes that five places with the same name are recorded in the *Gazetteer of Australia*, none of which are within a 250km radius of the proposed licence. The *Gazetteer of Australia* also records a further 28 places within Western Australia whose name includes the name of the hill, none of which are within a 100 kilometre radius of the relevant area. The grantee party also notes that the Tribunal's Native TitleVision service does not show any place with the same name within the proposed licence area (GP Contentions, paragraphs 9.21-9.27). I note that the name does not appear on the map produced by the Tribunal for the purpose of these proceedings.

[55] The grantee party accepts that, to the extent that the Tribunal finds the hill is within, or relevantly proximate to, the proposed licence, the place may have significance in accordance with the traditions of the native title party, though it notes that Mr Wongawol deposes that the hill is a 'special place' whereas Mr Farmer attaches significance to 'the really special places' at and around the hill (GP Contentions, paragraphs 9.28-9.34; FW Affidavit, paragraph 11; DAF Affidavit, paragraph 10). However, the grantee party contends that the evidence is insufficient to establish that

any areas or sites within the proposed licence are of particular significance within the meaning of s 237(b) (GP Contentions, paragraphs 9.35-9.39).

[56] Furthermore, the grantee contends that, to the extent the Tribunal finds there are areas or sites of particular significance within the proposed licence, the evidence of the native title party is insufficient to establish the likelihood of interference. In particular, the grantee party contends that the evidence as to how the hill might be interfered with is inconsistent, contradictory and speculative and focuses on damage to the *jukurrpa* rather than the place itself. In this regard, the grantee party contends that the activities permitted by the proposed licence are unlikely to change the place to such an extent that it cannot continue to be identified as that place for the purpose of the dreaming or in any way detract from the place. The grantee party also submits that the grant of the proposed licence will have no greater impact than previous exploration and pastoral activity and the regulatory regime established under the AHA will be sufficient to ensure that interference of the kind contemplated by s 237(b) is unlikely (GP Contentions, paragraphs 9.40-9.50).

[57] The Government party supports and accepts the grantee party's contentions regarding the location of the hill. Furthermore, the Government party contends that the fact the hill is described as a 'special place' is not determinative of whether or not a site is of particular significance within the meaning of s 237(b) and the evidence does not explain the underlying significance of the site (GVP Contentions, paragraphs 73-78). In any event, the Government party submits (at GVP Contentions, paragraph 79) that interference is unlikely to occur because:

(a) it is evident that the native title party's concern relates to *jukurrpa* rather than the hill itself, and it is unlikely the proposed licence will impact the site to the extent that it cannot be identified for the purpose of the *jukurrpa*;

(b) interference with songlines is not covered by s 237(b) as they are not 'areas' or 'sites' within the meaning of that section;

(c) 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 having first undertaken a heritage survey. Accordingly, any

ground disturbing activities are intended to be conducted in a way which will not adversely impact on heritage sites and will respect local Aboriginal cultural concerns;

(d) the area has been subject to prior mineral exploration and possibly mining activity and is entirely covered by the Cunyu pastoral lease 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 area; and

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

[58] In reply, the native title party contends (at NTP Reply, paragraphs 5.14, 5.16):

(a) the AHA is not a complete answer to whether interference of the kind contemplated by s 237(b) is likely to occur, so the grantee party's awareness of its obligations are not sufficient to prevent interference with areas or sites of particular significance;

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

(c) the contention that interference must necessarily be 'physical' and determined 'objectively' or without reference to traditional law and custom should not be accepted, and the suggestion that all sites or areas of particular significance must have physical form is to take an overly narrow and inaccurate view of traditional law and custom; and

(d) the grantee party has not disclosed on what basis, and by whom, interference with Aboriginal sites will be 'authorised'. In this regard, the native title party notes the existence of provisions under the RSHA which it says facilitate the destruction of or damage to sites through applications under s 18 of the AHA.

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

[59] In relation to the native title party's contentions regarding the relevance of the AHA and the RSHA to the inquiry under s 237(b), I adopt my observations in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara* at [133]-[135].

Efficacy of Regulatory Regime

[60] The native title party refers to the existence of various reports and documents which it says clearly evidence a history of failure by Government departments to properly monitor and enforce the *Mining Act* and the AHA. Specifically, the native title party notes the findings made in a report of a review of the Department of Indigenous Affairs (now DAA) authored by Dr Dawn Casey and published in September 2007 and the report of the Western Australian Auditor General in September 2011 entitled *Ensuring Compliance with Conditions on Mining*. The native title party also refers to a press release issued on 13 November 2007 by then Resources Minister, the Hon Francis Logan MLA, concerning the breach of conditions on exploration tenements. The native title party submits that, in light of this evidence and the evidence regarding the existence of areas or sites of particular significance, the State's regulatory regime will mean that the proposed licence is likely to result in interference of the kind referred to in s 237(b) (NTP Contentions, paragraphs 2.14-2.21).

[61] The issues raised in the Auditor General's report were considered by the Tribunal in *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]. As noted above at [15], I adopt Member Shurven's findings in *Karajarri Traditional Lands Association v ASJ Resources*. I also 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). In any event, the Tribunal has previously accepted that the effectiveness of the regulatory regime does not necessarily require universal compliance by enforcement of protective measures and each matter must be dealt with on its own individual facts.

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

[62] 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 that this issue is currently before the Federal Court on appeal from the Tribunal's determination in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (GVP Contentions, paragraph 60). I note that the Federal Court has since handed down judgment in the matter (see *FMG Pilbara v Yindjibarndi Aboriginal Corporation*).

[63] 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 submits that the approach outlined by French J (as he then was) in *Smith v Western Australia* in relation to s 237(a) should also be applied to s 237(b) (GP Contentions, paragraphs 4.3-4.6). Furthermore, both the grantee party and the Government party submit that, because 'areas' or 'sites' are physical in nature, any interference must also be physical (GP Contentions, paragraph 4.6; GVP Contentions, paragraphs 61, 79(b)).

[64] I recently addressed these issues in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara* and I adopt the observations I made there at [138]-[141].

Consideration of s 237(b)

[65] I accept that, on the basis of the evidence of Mr Wongawol and Mr Farmer, the area around the hill is an area of particular significance, given its association with the *jukurrpa* and the consequences which are said to arise from interference with the area.

[66] The grantee party contends that the evidence presented by the native title party in this matter is of a similar nature to the evidence before the Tribunal in *Tullock v Kimba Resources* and *WF v JML Resources*. In *Tullock v Kimba Resources*, Member Shurven considered that evidence in relation to a hill created by a dreaming story did not establish the particular significance of the site (at [59]-[60]). In *WF v JML Resources*, Member O'Dea was not satisfied that the evidence before him supported the particular significance of a *jukurrpa* which was said to traverse the area, though he acknowledged there may be places associated with the *jukurrpa* which might meet the

description of an area or site of particular significance. In particular, Member O'Dea observed that a clear distinction had been drawn in the evidence of the native title party between places where the *jukurrpa* had 'sat down' and places where 'they just travelled over' (at [32]).

[67] In my view, the conclusion that the area around the hill is an area of particular significance is consistent with the findings of Member O'Dea in *WF v JML Resources*. The evidence in this matter indicates that the hill is associated in the traditions of the native title party with the specific activities of the *jukurrpa*. It is clear that the area's significance to the native title holders and *wati* in particular is derived from these activities. In this respect, the present case can also be distinguished from *Tullock v Kimba Resources*, where the evidence merely stated that the *jukurrpa* had made the hill and that it was connected to another site. In that matter, Member Shurven made specific reference to the lack of detail and specificity in the native title party's evidence. In the present case, I am satisfied that the evidence establishes the particular significance of the hill.

[68] On the other hand, applying the approach of Member O'Dea in *WF v JML Resources*, I do not accept the evidence supports the conclusion that the *jukurrpa* itself (that is, the area which the *jukurrpa* is said to traverse) may be regarded as an area or site of particular significance. As Member O'Dea observed in *WF v Emergent Resources* at [45], mere reference to the existence of a *jukurrpa* without identifying the nature of its significance or its location does not provide an adequate basis for a finding that areas or sites of particular significance exist. The evidence relied on by the native title party in these proceedings does not define the areas over which the *jukurrpa* is said to travel or address the particular significance of these areas. According, I do not find that the *jukurrpa* is an area or site of particular significance.

[69] Notwithstanding my finding that the hill is an area of particular significance, I am not satisfied on the evidence that the hill or the *jukurrpa* are located within or relevantly proximate to the proposed licence area. In the absence of the map referred to in the affidavits of Mr Wongawol and Mr Farmer, it is difficult to conclude that the deponents understand the precise location and extent of the proposed licence. This difficulty is compounded by other problems with the evidence. For example, Mr Farmer refers to Well No 2, which is located to the east of the proposed licence on the

Canning Stock Route, as the site of the Kutkabubba community, whereas the community is in fact located approximately 50 kilometres to the south. I also note that neither deponent refers to or acknowledges the existence of the registered sites. Although an omission of this nature would not usually be fatal, it assumes greater importance where there are questions around the deponents' knowledge of the area affected by the grant.

[70] In the circumstances, I consider there are real doubts about the deponents' familiarity with the location and extent of the proposed licence. These doubts are not resolved by the subsequent production of the scale replica map, particularly where the native title party has been unable to locate the original map and there is therefore a degree of uncertainty about the fidelity of the replica. Consequently, I accept that the references to the hill and the *jukurrpa* in the affidavits of Mr Wongawol and Mr Farmer are of little probative value and I am not able to conclude that they are located within or relevantly proximate to the proposed licence area.

[71] The Tribunal has previously emphasised that, where it is asserted that an area or site is of particular significance, the area or site must be identified (see *Western Australia v McHenry*; *Young v Western Australia*). Although there is no burden of proof on any party in proceedings such as these, a party seeking to establish the existence of areas or sites of particular significance must nevertheless provide evidence with sufficient detail and specificity to enable the Tribunal to carry out the predictive assessment required by s 237(b), including as to the location and significance of the relevant areas or sites (see *Cheinmora v Heron Resources*; *Parker v Iron Duyfken*; *Wanjina-Wungurr (Native Title) Aboriginal Corporation v Braeburn Resources 1* at [42]-[43]. The Tribunal may take into account the existence of an area or site whose precise location has not been established in circumstances where the evidence is otherwise compelling (see *Wanjina-Wungurr (Native Title) Aboriginal Corporation v Braeburn Resources 2* at [41]-[43]). However, the uncertainty about the location of the hill relative to the proposed licence weights against such a conclusion.

[72] The native title party contends that the area within the proposed licence is of particular significance and that the nature of the country is such that any entry onto parts of the licence or the surrounding areas which has not been agreed with the native title party would likely result in interference of the kind referred to in s 237(b). In determining

whether an area or site is one of particular significance, the Tribunal will have to make a value judgment as to whether, from the point of view of the native title party, the area or site is special or different from other land in respect of which the native title party has native title rights and interests. This interpretation is consistent with the view that all of a native title holder's land is significant to the native title holder, and that persons may speak of areas that are of 'particular significance' in accordance with their traditions (see *Western Australia v Thomas* at 173-174). In my view, the particular significance of the area in question is not established by the evidence.

[73] In conclusion, I find that the grant of the proposed licence is not likely to interfere with any area or site of particular significance to the native title holders.

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

[74] As noted above at [28], the native title party makes no contentions in relation to s 237(c). The affidavits of Mr Wongawol and Mr Farmer do not specifically address the issue of major disturbance.

[75] The Tribunal has generally found that the grant of an exploration licence is unlikely to involve, or create rights whose exercise is likely to involve, major disturbance to land and waters (see *Champion v Western Australia*). In the present case, there is nothing in the evidence before the Tribunal to suggest that major disturbance is likely to arise from the grant of the proposed licence. In arriving at this conclusion, I have also had regard to the following:

(e) The proposed licence area is currently subject to a pastoral lease and has previously been subject to exploration interests. It is likely that activities carried on pursuant to these interests have already caused some degree of disturbance.

(f) The conditions to be imposed by the Government party require the grantee party to rehabilitate any disturbance made to the surface of the land to the satisfaction of the Environmental Officer, Department of Mines and Petroleum, and prohibit the use of mechanised equipment unless written approval is obtained.

(g) There is no evidence of any topographical, geological or environmental characteristics that might lead to the conclusion that exploration activity would result in major disturbance to land or waters.

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

Determination

[77] The determination of the Tribunal is that the grant of exploration licence E69/3120 to FMG Resources Pty Ltd is an act attracting the expedited procedure.

Mr JR McNamara
Member
5 February 2015