NATIONAL NATIVE TITLE TRIBUNAL

Tarlka Matuwa Piarku Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd and Another **[2015] NNTTA 6 (5 February 2015)**

Application Nos: WO2013/1103, WO2013/1104

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

- and -

IN THE MATTER of an inquiry into expedited procedure objection applications

Tarlka Matuwa Piarku Aboriginal Corporation RNTBC (native title party)

- and -

FMG Pilbara Pty Ltd (grantee party)

- and -

The State of Western Australia (Government party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

DETERMINATION THAT THE ACT IS NOT AN ACT ATTRACTING THE EXPEDITED PROCEDURE

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

Catchwords: Native title – future acts – proposed grant of exploration licences – expedited procedure objection applications – gender-restricted evidence – non-disclosure directions – failure to annex maps to affidavits – relevance of grantee party's intentions – whether acts are likely to interfere directly with the carrying on of community or social activities – whether acts are likely to interfere with sites of particular significance – whether acts are likely to involve major disturbance to land or waters – expedited procedure attracted/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 17, 18

Cases:

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

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*’)

BW (Deceased) and Others on behalf of Bunuba/Western Australia/Francis Robert Salmon and Jamie Dean Duffield [2012] NNTTA 27 (‘*BW v Salmon*’)

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*’)

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*’)

Jaru Native Title Claimants/Western Australia/Golden Granite Pty Ltd/Krama Pty Ltd [2013] NNTTA 123 (‘*Jaru v Golden Granite*’)

John Walter Graham and Others on behalf of Ngadju v Dunstan Holdings Pty Ltd [2014] NNTTA 84 (‘*Graham v Dunstan Holdings*’)

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*’)

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*’)

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*’)

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

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

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) and Others on behalf of Wiluna v Tropical Resources Pty Ltd and Another [2014] NNTTA 104 (‘*WF v Tropical 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 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 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 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 E69/2728 and E69/2729 ('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 can be granted 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] E69/2728 comprises an area of 225.8 square kilometres situated 115 kilometres northerly of Wiluna. E69/2729 comprises an area of 24.7 square kilometres, 85 kilometres northerly of Wiluna. The proposed licences are both located in the Shire of Wiluna.

[3] The proposed licences are 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.

[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 persons comprising the applicant in the Wiluna claim lodged with the Tribunal objections to the inclusion of the expedited procedure statement with respect to the proposed licences. 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').

[6] At a preliminary conference held on 3 December 2013, representatives for the grantee party informed the Tribunal that it had been involved in discussions with the native title party in relation to the proposed licences and other matters. The matter was therefore adjourned to a status conference on 9 April 2014, at which point the grantee party representative indicated it was still in the process of negotiating with the native title party. Consequently, the Tribunal issued directions for inquiry.

[7] 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 deponent is a senior *wati* (initiated law man) and made his affidavit on condition that no women would be made aware of its contents.

[8] 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.

[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 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.

[10] I have considered the material provided to the Tribunal in relation to the objections and I am satisfied 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.

E69/2728

[19] The Tengraph quick appraisal establishes that the underlying tenure of E69/2728 is as follows:

- Pastoral Lease 3114/1049 (Cunyu) overlapping at 60.6 per cent.
- Unnumbered Land Act Reserve (UNN 1001) overlapping at 39.4 per cent. This reserve covers the Canning Stock Route.
- Historical lease 395/460 overlapping at 9.3 per cent.

[20] I also note that the quick appraisal indicates that 40.1 per cent of the proposed licence area is subject to a file notation recording the issue of a licence over part of the Canning Stock Route for the occupation and continued use of pastoral improvements.

[21] The quick appraisal shows that the area within E69/2728 has previously been subject to 19 exploration licences granted between 1987 and 2008, overlapping the area at between 0.1 per cent and 84.9 per cent, with an average lifespan of two years and one month. The area has also been subject to four temporary reserves granted between 1959 and 1979, overlapping between 100 per cent and less than 0.1 per cent, with an average lifespan of two years and one month. An exploration licence held by Zenith Minerals Limited, granted in 2009, currently overlaps E69/2728 by 83.5 per cent.

[22] The quick appraisal also records the following features within E69/2728: one undeveloped deposit (Red Lake Mn); one undeveloped prospect/outcrop (Red Lake Area C); 16 tracks, including the Canning Stock Route; two wells/bores with windmills (No 6 and No 8 Bores); 22 non-permanent named lakes, including Lake Edith Withnell and Red Lake; 29 non-perennial lakes; 70 minor non-perennial watercourses; and two waterholes.

[23] The report from the DAA Database establishes the existence of one site registered under AHA within E69/2728 (Site ID 2562: Wancamp – artefacts/scatter).

E69/2729

[24] The Tengraph quick appraisal establishes that E69/2729 is entirely covered by pastoral lease 3114/654 (Granite Peak). The quick appraisal also indicates that the

area within E69/2729 has previously been subject to five exploration licences granted between 1988 and 2008, overlapping the area at between two per cent and 100 per cent, with an average lifespan of one year and three months. The area has also been subject to a temporary reserve granted in 1959 and cancelled in 1964 which covered the entire area.

[25] The quick appraisal also records the following features within E69/2729: one track; one fence line; one well/bore with windmill (Davidson Well); four non-perennial lakes and one minor non-perennial watercourse.

[26] The report from the DAA Database establishes there are no registered sites within E69/2729.

Conditions and Endorsements

[27] 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.
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> 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.

[28] E69/2728 will also be subject to the following condition:

> 7. No exploration activities being carried out on Stock Route Reserve UNN 1014 which restrict the use of the reserve.

[29] It is apparent that the reference to UNN 1014 is a typographical error and I presume it was intended to refer to the Canning Stock Route Reserve UNN 1001.

[30] 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

[31] 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 licences are 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.

[32] The extent of previous mineral exploration interests in the proposed licence area is outlined above at [21] and [24]. The documents provided by the Government party indicate that 19 exploration licences have been granted over the area of E69/2728 since 1987. Several of these covered over 10 per cent of the proposed licence area, though only one had a term exceeding five years. I do note, however, that an existing exploration licence has existed over the substantial part of the area since 2009. In relation to E69/2729, the Government party documents indicate that five exploration licences have been granted in the area since 1989. Several of these licences covered over 50 per cent of the area, including two which covered the entire area, though only one of these had a term exceeding 12 months.

[33] 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]. However, 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 on E69/2728. In particular, I note that a large part

of the area has recently been subject to an existing exploration licence, which has been in existence since 2009. I also note that the area is subject to an existing pastoral lease and a significant portion of the land is reserved as part of the Canning Stock Route. Although it is not possible to determine the precise extent of any previous interference, 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. I have also taken into account the existence of the pastoral lease in relation to E69/2729, though I am not satisfied the evidence of previous mineral tenure suggests there has been extensive exploration or mining in the area, as only two of the five exploration licences that have been granted over the area have terms exceeding 12 months, namely E69/839 (19 months, overlapping by two per cent) and E69/969 (26 months, overlapping by 52 per cent).

Native Title Party Evidence

[34] 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).

[35] In support of its contentions, the native title party relies on the affidavit of Frankie Wongawol sworn 7 June 2014 ('FW Affidavit'). As noted above at [6]-[8], directions have been issued in relation to the affidavit pursuant to s 155(1) of the Act. These directions require the document 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.

[36] 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 Mr Wongawol's affidavit and have disclosed its 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.

[37] Mr Wongawol states that he is a traditional owner for the Wiluna claim area. Mr Wongawol also states that he is a *wati* and has cultural authority for the proposed licence areas. I accept that Mr Wongawol is authorised to speak on behalf of the native title party in relation to the proposed licence areas.

Failure to annex maps

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

[39] 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.

[40] 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.

[41] 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).

[42] 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 A0 size maps of the proposed licences to Mr Wongawol. Mr Allbrook states that he has undertaken a search of the files kept by CDNTS in relation to these proceedings and located exact copies of the maps, and attaches scale replica maps which he believes are identical to the maps shown to Mr Wongawol on 7 June 2014.

[43] 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 do note that some of the features referred to in Mr Wongawol's affidavit are not depicted on the maps.

Grantee Party Evidence

[44] 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.

[45] 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 a map of the proposed licences produced by Fortescue.

[46] 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).

[47] 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 16).

[48] The s 58(1)(b) statements annexed to Mr Weaver's affidavit suggest 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

[49] 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).

[50] 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 will 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 in terms of making the predictive assessment required by s 237, it is appropriate to have regard to the policies, procedures and protocols adopted by the grantee party in evaluating the likelihood of interference.

Materials produced by the Tribunal

[51] On 23 October 2014 and 5 December 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.

[52] 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 they 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 maps.

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

[53] As noted above at [34], the native title party has made no contentions in relation to community or social activities carried on in the proposed licence areas. Notwithstanding the fact that the native title party has elected not to address this issue, the Tribunal is nevertheless required to consider whether there is any evidence to support the conclusion that the proposed licences are likely to interfere with such activities (see *Graham v Dunstan Holdings* at [8]).

[54] Mr Wongawol refers to singing a song while visiting the area around Lake Nabberu and an outcamp near E69/2729. In *BW (Deceased) v Salmon*, Member Shurven accepted (at [42]) that the singing of songlines can amount to a community or social activity for the purposes of s 237(a). I accept that view. However, there is no indication in the present case that the activities proposed by the grantee party are likely to interfere directly with the singing of songlines.

[55] In relation to E69/2728, Mr Wongawol refers to a number of special law grounds and other sites associated with initiation rituals. As discussed below in relation to s 237(b), I find that the evidence only establishes the existence of one such place, and it appears this place is located to the south of the proposed licence area. In the circumstances, I am not satisfied there is a real risk that grant of E69/2728 will interfere with law business or any other ceremonial activity.

[56] In conclusion, I find that the proposed licences are not likely to interfere with the carrying on of the native title party's community or social activities.

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

Contentions and evidence in relation to s 237(b)

[57] The native title party contends that the proposed licences contain 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:

- two *jukurrpa* (dreaming tracks or songlines) are present in E69/2729 that create and transform the landscape in ways that are not immediately apparent to people without the requisite cultural knowledge;

- there are secret cultural songs associated with one of the *jukurrpa* in E69/2729 that are considered dangerous if not performed by initiated men upon access to sites in E69/2729;

- another two *jukurrpa* are also present in E69/2728 and secret initiation rituals are performed inside E69/2728 at secret law grounds that cannot be known to uninitiated men or women; and

- the law grounds contain objects used in secret initiation rituals found inside E69/2728;

- sites located within the proposed licences are considered culturally secret and dangerous and should not be known by women or uninitiated men;

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

- sites located within the proposed licences are associated with the transferral of ceremonial and cultural knowledge from the older generation to the younger generation of *wati*.

[58] The native title party contends that the areas within the proposed licences are 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 licences 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 licences 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).

[59] The native title party also 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 submits 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).

[60] Mr Wongawol deposes that places exist within E69/2728 that women and boys cannot visit and places 'you can't go to unless you've been put through our tribal law' (FW Affidavit, paragraphs 13-14). Mr Wongawol says there is a place in E69/2728 where initiation rites are carried on (I refer to this as the 'ritual site') and another place to the north which was made by one of the *jukurrpa* (I refer to this as to '*jukurrpa* site'). Mr Wongawol states that there are special law grounds 'all in-between' these two sites and certain objects were made at these law grounds by the old people. Mr Wongawol also states that there is a body of water in E69/2728 that is connected to another *jukurrpa*. According to Mr Wongawol, this site 'is very sacred and it is *ngulu* [dangerous] for people to be near there because it's very important to *wati*' (FW Affidavit, paragraphs 15-17). I refer this last site as the '*ngulu* site'.

[61] In relation to E69/2729, Mr Wongawol states that a *jukurrpa* is present in the area that travels through a series of places in the determination area before stopping at a shore near the outcamp in E69/2729. One of the places the *jukurrpa* passes through is also one of the main places for another *jukurrpa*. Mr Wongawol states that the outcamp is 'an important place for Martu people … because the old people camped there' (FW Affidavit, paragraphs 8-9). Mr Wongawol also states that there is a dreamtime song at the outcamp and the shoreline in E69/2729, but cannot speak to anyone about it unless they have been through tribal law. Mr Wongawol says that he sings the song when he

visits the area around the outcamp and Lake Nabberu. Mr Wongawol also states that the outcamp is associated with a story about the massacre of Martu people, but he cannot tell the story in public (FW Affidavit, paragraphs 9-12).

[62] The grantee party contends that no particulars are provided in relation to the areas to which access is said to be restricted or the special law grounds in between the ritual site and the *jukurrpa* site in E69/2728. Furthermore, the grantee party contends that the map annexed to the affidavit of Mr Weaver indicates that the ritual site (or at least, the geographical feature used to describe the site) is outside E69/2728. The grantee party also notes that the name used to describe the *jukurrpa* site appears in relation to two distinct features, both of which are to the north of E69/2728. In relation to E69/2729, the grantee party disputes that there is any shore within or relevantly proximate to the area affected by the proposed licence. The grantee party also disputes that the outcamp and the site where the two *jukurrpa* are said to overlap are within or relevantly proximate to E69/2729. The grantee party accepts that, to the extent these sites are located on or relevantly proximate to E69/2728 or E69/2729, they may be of significance to the native title party. However, the grantee party says the evidence is insufficient to establish any of those areas or sites as being of particular significance or that interference is likely to occur (GP Contentions, paragraphs 9.3-9.20)

[63] The Government party states that it supports and relies on grantee party contentions insofar as they relate to sites which Mr Wongawol deposes exist within E69/2729 (GVP Contentions, paragraphs 67). In relation to E69/2728, the Government party contends that Mr Wongawol's evidence lacks specificity in relation to the access-restricted sites and the special law grounds, and the sites to which he specifically refers are not located within the area affected by the proposed licence (GVP Contentions, paragraphs 77-83). Furthermore, the Government party contends that the mere fact that a *jukurrpa* travels through an area and stops at particular sites is not sufficient to establish the existence of an area or site of particular significance where the significance of that fact is not explained (GVP Contentions, paragraphs 67-75).

[64] The Government party submits (at GVP Contentions, paragraph 79) that, if there are areas or sites of particular significance that exist within E69/2728 or E69/2729, interference is unlikely to occur because:

(a) to the extent that sites of particular significance exist within either of the proposed licence, the grantee party is aware of the existence of those sites and its legal obligations in respect of those sites and has agreed to work with the native title party through the RSHA to avoid inference;

(b) 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;

(c) the areas have been subject to prior mineral exploration and possibly mining activity and are entirely or largely covered by pastoral leases, 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; and

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

[65] 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)

[66] 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

[67] 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).

[68] 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 [16], 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)

[69] 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 2* (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*).

[70] 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)).

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

Does the evidence establish the existence of areas or sites of particular significance?

[72] In relation to E69/2728, I accept that the ritual site is a site of particular significance to the native title party. The grantee party disputes this on the basis that Mr Wongawol does not draw a distinction between the ritual site and other sites of a similar nature and, in particular, does not inform whether there are other places where similar cultural practices occur. I do not accept that contention. Though the evidence must

provide a basis for assessing the particular significance of the area or site (see *Yindjibarndi Aboriginal Corporation v FMG Pilbara 1* at [129]), that does not require the native title party to enumerate every area or site within the claim or determination area that might possess the same or similar features and describe in precise terms their comparative significance. Equally, the fact that there may be more than one site of a particular kind within a claim or determination area does not mean that a site of that kind cannot be of 'special or more than ordinary significance' to the native title holders. The evidence must disclose that the area or site possesses some feature or features in accordance with the traditions of the native title party that support the conclusion that it is an area or site of particular significance (cf *Sturt v Baracus* at [64]-[65], citing *Jaru v Golden Granite* at [46]). In the present case, I am satisfied that the ritual site does possess features that 'stand out' from the general background of other sites and the country as a whole.

[73] In relation to the *jukurrpa* site and the *ngulu* site, the grantee party relies on the following passage from *WF v Emergent Resources* (at [45]):

> The native title party is required to provide sufficient detail and specificity to allow the Tribunal to make the predictive assessment in accordance with s 237(b) … Mere reference to the existence of a jukurrpa or ngulu place without identifying the nature of its significance or its location does not provide an adequate basis for the Tribunal to make a finding about the existence of sites or areas of particular significance on the proposed licence, let alone a finding that the area in which the tenement is located is site rich or imbued with a pervasive spirituality such that any unauthorised entry on the tenement would constitute relevant interference.

[74] I accept that, if it is asserted that an area or site is one of particular significance, it must be known and must be able to be located and its significance explained to the Tribunal (see *Silver v Western Australia* at [91], citing *Western Australia v McHenry*; *Yindjibarndi Aboriginal Corporation v FMG Pilbara 1* at [17]). There is no doubt that the area or site would have to be identified (see *Young v Western Australia* at [38]) and the Tribunal has held that the particularity of the significance must also be capable of identification (see *Western Australia v McHenry*).

[75] In the present case, the fact that the *ngulu* site is located within E69/2728 is not disputed. There is some uncertainty about the location of the *jukurrpa* site, given that it is described by reference to a name which is shared by two places located to the north of E69/2728 and approximately 20 kilometres apart. As Mr Wongawol describes the site as being near a road that goes to the Carnarvon Ranges, I am

prepared to infer that the *jukurrpa* site is situated at the western-most location. However, it is clear nonetheless that the site is located some distance from E69/2728.

[76] In relation to the *jukurrpa* site, the extent of Mr Wongawol's evidence is that it was made by a particular *jukurrpa*. In the circumstances, I am not satisfied that the evidence establishes the particular significance of the site. In spite of this, I do not accept that the same conclusion is appropriate for the *ngulu* site. Mr Wongawol states that there are places in E69/2728 which are 'very, very sacred and part of our initiation ceremonies.' Although Mr Wongawol does not specifically describe any ceremonial activities that occur at the *ngulu* site, he does state that the area is 'very sacred' and 'very important to *wati*.' Mr Wongawol also states that he cannot disclose 'what happens' at the site, even if it is made secret. I also note that the Tribunal is aware from its experience in previous matters that the *jukurrpa* with which the site is associated is intimately connected to male initiation rites. On this basis, I am prepared to infer that the *ngulu* site is one of the initiation sites referred to by Mr Wongawol and I am satisfied that the evidence supports the conclusion that the site is one of particular significance to the native title party.

[77] In relation to other access-restricted sites or special law grounds to which Mr Wongawol's refers in his affidavit, I do not accept that these sites have been identified to the requisite degree to establish the existence of areas or sites of the relevant kind.

[78] In relation to E69/2729, I infer that Mr Wongawol's reference to the shore is a reference to the shoreline of Lake Nabberu, which is located to the west of the area affected by the proposed licence. Contrary to the grantee party's submission, the map annexed to the affidavit of Mr Weaver indicates that the shoreline intersects or at least abuts the western boundary of E69/2729. This is also evident from the map produced by the Tribunal and is consistent with one interpretation of Mr Wongawol's evidence, as the section of shoreline intersecting or abutting the western boundary of E69/2729 is also the part which is closest to the outcamp. However, I am not satisfied the evidence supports the particular significance of this section of shoreline. In particular, I note that the evidence does not suggest any basis for the site's significance other than the fact the *jukurrpa* stopped there.

[79] Similarly, I do not consider the reference to the dreaming story is sufficient to establish the particular significance of the outcamp. The evidence of Mr Wongawol indicates that the song relates to a broader area encompassing the outcamp and Lake Nabberu, and there is nothing in the evidence to distinguish this broader area from the other areas to which the song relates. However, I do note that the evidence of Mr Wongawol suggests the outcamp is also believed to be the site of a massacre. In previous decisions, the Tribunal has accepted that massacre sites may be regarded as sites of particular significance (see *WF v Tropical Resources* at [61] and the cases cited) and I accept that this is the case in the present matter.

[80] In relation to the site where the two *jukurrpa* are said to overlap, it is not apparent that Mr Wongawol is in fact suggesting this place is on or in the vicinity of E69/2729, and it does not appear on any of the maps before the Tribunal. Though I accept that the site may have significance in accordance with the traditions of the native title party, I am not satisfied that the site is within or relevantly proximate to the proposed licence areas.

Is interference likely to occur?

[81] As I have found that the ritual site, the *ngulu* site and the outcamp are sites of particular significance to the native title holders, it is necessary to determine whether the grant of the proposed licences is likely to interfere with these sites for the purposes of s 237(b).

[82] The map of E69/2728 annexed to the affidavit of Mr Weaver and the relevant map produced by the Tribunal indicate that the feature identified with the ritual site is located approximately two kilometres from the tenement boundary. Similarly, the map of E69/2729 annexed to the Weaver Affidavit and the respective Tribunal map indicate that the outcamp is situated approximately two kilometres to the east of the tenement boundary.

[83] The Tribunal may take into account the effect of off-site activities that may be undertaken by the grantee party if there is a clear nexus between the activities and the issues to be considered under s 237 (see *Silver v Northern Territory* at [35]). In the present case, I note that the outcamp is located on one of the main access tracks into E69/2729. In this sense, there is a real likelihood that the grantee party may come in

close proximity to the site en route to exploration targets in the proposed licence area. However, I am not satisfied there is a real risk of interference with the site. Although Mr Wongawol suggests that parts of the story associated with the outcamp are secret, he does not expressly state that people are not permitted to access the site. As the site is located in close proximity to the track, it is quite possible that other people, including the pastoral leaseholder, have entered or come into close proximity to the area without authorisation. I also note that the grantee party's Heritage Guidelines provide that personnel are instructed to remain on existing roads and tracks, which is likely to reduce the likelihood of any inadvertent interference with the site.

[84] In relation to the ritual site, the evidence of Mr Wongawol suggests that interference may arise as a result of unauthorised access to the site, as it is an area associated with specific male initiation rituals. However, there is little to suggest that the grantee party is likely to come across the site while carrying on its exploration program. The feature associated with the ritual site is not situated near any existing roads or tracks and the area is unlikely to be used as an access point by the grantee party. Although it is possible that the site's actual location may not precisely correspond to the location of the physical feature as indicated on the maps, it is reasonable to assume that it is likely to be situated in close proximity to that feature. In these circumstances, I am not satisfied there is a real risk of interference with the site arising from the grant of the proposed licence.

[85] In relation to the *ngulu* site, Mr Wongawol states that it is dangerous for people to be near the site. In the context of Mr Wongawol's evidence regarding initiation sites in and around E69/2728 and his statement regarding the site's significance to *wati,* I infer that this applies particularly to women and non-initiated men. Mr Wongawol also states that he has an obligation to ensure that people do not go to places where they might hurt the *jukurrpa* and that even chipping rocks or 'digging up the ground a bit and leaving a hole' would hurt the *jukurrpa*. This suggests that interference may arise as a result of low level exploration or mere access to the site.

[86] 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'.

[87] 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 *ngulu* site. 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 *ngulu* site. 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. As I noted in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara* at [101], it is not clear why the Government party's policy as outlined in the DMP Guidelines does not seem to have been followed in this instance. 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 the *ngulu* site in accordance with the traditions of the native title party. In the circumstances, I accept there is a real risk of interference with the site.

[88] In conclusion, I find that s 237(b) is satisfied in relation to E69/2729 but is not satisfied in relation to E69/2728.

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

[89] As noted above at [34], the native title party makes no contentions in relation to s 237(c). The affidavit of Mr Wongawol does not specifically address the issue of major disturbance.

[90] 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:

(a) The proposed licence areas are currently subject to pastoral leases and have previously been subject to exploration interests. It is likely that activities carried on pursuant to these interests have already caused some degree of disturbance. I also note that a significant portion of E69/2728 forms part of the Canning Stock Route and it is likely that the use of the stock route has contributed to the existing level of disturbance.

(b) 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.

(c) 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.

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

Determination

[92] The determination of the Tribunal is that:

(1) the grant of exploration licence E69/2728 to FMG Pilbara Pty Ltd is not an act attracting the expedited procedure; and

(2) the grant of exploration licence E69/2729 to FMG Pilbara Pty Ltd is an act attracting the expedited procedure.

Mr JR McNamara
Member
5 February 2015