NATIONAL NATIVE TITLE TRIBUNAL

Billy Atkins and Others on behalf of Gingirana v FMG Resources Pty Ltd and Another **[2015] NNTTA 7 (5 February 2015)**

Application No: **WO2013/1357**

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

- and -

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

Billy Atkins and Others on behalf of Gingirana (WC2006/002) (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 – whether act is likely to interfere with sites of particular significance – whether act is likely to involve major disturbance to land or waters – expedited procedure attracted

Legislation: *Native Title Act 1993* (Cth), ss 29, 30(1), 31, 32(3), 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*’)

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

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

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*’)

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

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

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

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

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*’)

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

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

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

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

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

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

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

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

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

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

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

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 28 August 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 E69/3176 ('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 28 August 2013.

[2] According to the notice, the proposed licence comprises an area of 19 graticular blocks (approximately 53 square kilometres) located 166 kilometres northerly of Wiluna in the Shire of Wiluna. The proposed licence is wholly situated within the Gingirana native title claim (WC2006/002 – registered from 13 April 2006).

[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 21 December 2013, the persons comprising the applicant in the Gingirana claim ('the native title party') lodged with the Tribunal an objection to the inclusion of the expedited procedure with respect to the proposed licence.

[5] At a preliminary conference convened by the Tribunal on 28 January 2014, the parties expressed the intention to negotiate an agreement that would dispose of the objection, and the matter was adjourned to a status conference on 28 May 2014. At the status conference, a representative for the grantee party indicated that the parties had exchanged drafts but had not reached agreement and requested that the matter proceed to an inquiry. Directions for inquiry were therefore issued by the Tribunal.

[6] In compliance with the directions, the Government party provided supporting documentary evidence on 11 June 2014 and, following an extension to the directions on 30 June 2014, the native title party provided a statement of contentions on 6 August 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 his affidavit was made on condition that no women would be made aware of its 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 12 August 2014 for the purpose of enabling parties to view the material and make submissions on the proposed directions. No party took issue with the directions proposed and directions were issued pursuant to s 155 of the Act.

[8] Given the delay occasioned by the provision of the restricted evidence and the issue of non-disclosure directions, I allowed an extension to directions on 21 August 2014. In compliance with the amended directions, the grantee party filed a statement of contentions on 9 September 2014, together with the affidavit of Thomas James Weaver affirmed 3 September 2014, and the Government party provided a statement of contentions on 15 September 2014. The native title party provided a statement of contentions in reply on 1 October 2014, accompanied by the affidavit of Michael David Frith Allbrook affirmed 1 October 2014.

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

[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 vacant Crown land. The quick appraisal also indicates that the area is designated as a proposed conservation park (PCP/153). It also shows that the proposed licence area has previously been subject to six exploration licences granted between 1992 and 2008, overlapping the area at between 100 per cent and less than 0.1 per cent, with an average lifespan of four years and four months. The area has also been subject to five

temporary reserves granted between 1959 and 1980, overlapping at 6.5 per cent and 100 per cent, with an average term of two years and two months.

[19] The quick appraisal also records that two undeveloped prospects or drillholes (Miss Fairbairn Hills North 19 and Miss Fairbairn Hills North 20) are situated on the proposed licence.

[20] The reports from the DAA Database establish there are no registered sites or 'other heritage places' within the proposed licence area.

Conditions and Endorsements

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

> **In respect to DEC – Managed Lands Proposed Conservation Park 153 the following conditions apply:**
>
> 5. Prior to lodgement of a Programme of Work (PoW), the Licensee preparing a Conservation Management Plan (CMP) to address the conservation impacts of the proposed activities and submitting the CMP to the relevant Regional Manager of the Department of Environment and Conservation (DEC). This CMP shall be prepared pursuant to DEC-prepared "Guidelines for Conservation Management Plans Relating to Mineral Exploration on Lands Managed by the Department of Environment and Conservation" to meet the requirements of the Minister for Environment for acceptable impacts to conservation estate. A copy of the CMP and of DEC's decision on its acceptability under the guidelines is to accompany the lodgement of the PoW application with the Department of Mines and Petroleum
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> 6. At least five working days prior to accessing the reserve or proposed reserve area, unless otherwise agreed with the relevant Regional Manager of the Department of the Environment and Conservation (DEC-R), the holder providing the DEC-R with an itinerary and programme of the locations of operations on the Licence area and informed at least five days in advance of any changes to that itinerary. All activities and movements shall comply with reasonable access and travel requirements of the DEC-R regarding seasonal/ground conditions.
>
> 7. The Licensee submitting to the Director of Environment, Department of Mines and Petroleum (DMP), and to the relevant Regional Manager, Department of the Environment and Conservation (DEC-R) a project completion report outlining the project operations and rehabilitation work undertaken in the programme. This report is to be submitted within six months of completion of the exploration activities.

[22] The Government party's statement of contentions indicates that a condition will be also imposed requiring the grantee party to enter into a Regional Standard Heritage Agreement ('RSHA') with the native title party at the request of the native title party.

Relevance of previous mining interests

[23] The Government party and the grantee party both seek to rely on the existence of prior mineral exploration in support of the contention that the proposed licence is not likely to interfere with community or social activities or with areas or sites of particular significance. In particular, the Government party contends that the activities contemplated by the grantee party are likely to be the same as, or no more significant than, the previous and existing use of the area. Similarly, the grantee party contends that, given the whole area has been subject to prior mining tenure, the absence of any reference in the native title party's evidence to inference having arisen from those prior grants supports a finding that interference is unlikely.

[24] The extent of previous mineral exploration interests in the proposed licence area is outlined above at [18]. The Government party documents establish that six exploration licences have previously been granted over the proposed licence area. Four of these licences covered more than 30 per cent of the area and the latest of these (that is, E69/2289) covered the entire area for a period of five years.

[25] 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]. Those comments notwithstanding, I accept that, given the nature of the interests involved, it is open to the Tribunal to infer that exploration activity has occurred to some extent, particularly in relation to E69/2289. Although it is not possible to determine the precise extent of the activities carried on pursuant to the exploration licences, I accept that the Tribunal may have regard to their existence and the likely exercise of the rights created or conferred by the licences as part of the overall context.

Native Title Party Evidence

[26] 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 s 237(c). Therefore, the basis of the objection is that the grant of the proposed licence is likely to interfere with the carrying on of the community or social activities of the native title party pursuant to s 237(a) and with areas or sites of particular significance according to the traditions of the native title party pursuant to s 237(b).

[27] In support of its contentions, the native title party relies on the affidavit of Timmy Patterson sworn 29 July 2014 ('TP Affidavit'). As noted above at [6]-[7], 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.

[28] 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 Patterson'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 is 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.

[29] Mr Patterson states that he is a traditional owner for the proposed licence area; a member of the Gingirana claim group; and a senior initiated man. Mr Patterson states that he has cultural authority to speak for the area. I accept that Mr Patterson is authorised to speak on behalf of the native title party in relation to the proposed licence area.

Failure to annex maps

[30] The grantee party notes that Mr Patterson states that he was shown an A1 size map of the proposed licence by a staff member of Central Desert Native Title Services Ltd ('CDNTS'), but fails to: annex the relevant map to his affidavit; 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 his affidavit. Accordingly, the grantee party submits that there is no basis to assume that any map viewed by Mr Patterson correctly showed the location or extent of the proposed licence or any other feature which might have been on the map or that he knows the location or extent of the proposed licence (GP Contentions, paragraphs 3.2-3.3).

[31] 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.

[32] 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.

[33] The Government party supports and relies on the grantee party's contentions in relation to the failure to annex the map (GVP Contentions, paragraphs 31-32).

[34] 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 during the week of 28 July 2014 to attend a meeting of the Wiluna claim group and, on 29 July 2014, showed an A0 size map of the proposed licence to Mr Patterson. 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 29 July 2014.

[35] The grantee party submits that there are strong reasons against allowing the filing of remedial supplementary affidavit. I am prepared in the present case to accept Mr Allbrook's affidavit on the basis that it is relevant to the matters to be determined and does not raise any new issues (cf *Mungarlu Ngurrarankatja Rirraunkaja v FMG Resources* at [7]). However, I am not satisfied that Mr Allbrook's evidence necessarily addresses the issues raised by the grantee party and the Government party in relation to the affidavit of Mr Patterson. In particular, I note that Mr Allbrook was unable to obtain the exact copy of the map shown to the deponent and has only been able to produce a document which he believes to be a scale replica of that map. I also note that Mr Allbrook refers to having shown Mr Patterson an AO size map, whereas Mr Patterson states that he was shown as A1 size map. Though this may otherwise be a minor discrepancy, in the context of the failure to locate an exact copy of the map shown to Mr Patterson, it adds to, and perhaps illustrates, the difficulty with accepting the fidelity of the replica map provided by Mr Allbrook. Although Mr Patterson refers in his affidavit to a track coming from Marymia (which is approximately 25 kilometres north-west of the proposed licence) to the boundary of the Gingirana claim and this track is illustrated on the map as being within the boundaries of the proposed licence, this does not provide any certainty that the map shown to Mr Patterson accurately depicted the location and extent of the proposed licence itself.

[36] 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 proposed 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

[37] 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.

[38] 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'); and a statement made by the grantee party pursuant to s 58(1)(b) of the *Mining Act* in relation to the proposed licence.

[39] 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 10-12, 17-18).

[40] 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 the 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).

[41] 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

[42] 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 18). 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 5.5-5.9).

[43] 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 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

[44] On 30 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.

[45] The Government party indicates that it does not object to the Tribunal relying on the map for the purposes of the determination. Neither the grantee party nor the native title party commented on the Tribunal's proposed use of the map.

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

Contentions and evidence in relation to s 237(a)

[46] The native title party make the following contentions in relation to s 237(a):

(a) The Gingirana native title claim group has claimed rights, including the right of exclusive possession, in relation to the Gingirana claim area and the area of the proposed licence specifically (NTP Contentions, paragraph 5.5(a)).

(b) The Gingirana claim asserts that the community of native title holders are, in the area of the proposed licence, entitled as a matter of law to freely and without interference, exercise their native title rights and interests of exclusive possession, occupation, use and enjoyment in any manner in which they see fit (NTP Contentions, paragraph 5.5(b)).

(c) There are particular circumstances that exist at the site of the proposed licence that allow for specific sacred objects to be created there by the native title party. These objects are closely related to that particular site (NTP Contentions, paragraph 5.6(a)).

(d) The activity that can be undertaken in accordance with the proposed licence, specifically the right to clear vegetation, would impact on the ability of the native title holders to carry out this community or social activity (NTP Contentions, paragraph 5.7)

[47] Mr Patterson states that there is a rockhole in the proposed licence which is associated with a specific *jukurrpa* (law or dreaming). Mr Patterson describes a sound that can be heard near the rockhole and says this sound was caught by the *jukurrpa* and put into the rockhole and nearby trees. Mr Patterson states that the members of the native title party make a special device from the wood of the trees and use it to reproduce the sound (TP Affidavit, paragraph 10).

[48] The Government party contends that the bare fact that the native title party has claimed native title rights and interests does not provide evidence of any community or social activities that are actually carried out on the proposed licence. Further, the

Government party submits that, while the native title party asserts that it is entitled as a matter of law to exercise those rights and interests, the native title party fails to point to any evidence that it does in fact undertake any community or social activities on the area of the proposed licence (GVP Contentions, paragraphs 49-53).

[49] In relation to the evidence of Mr Patterson, the Government party and the grantee party both contend that his affidavit does not provide any evidence of relevant community or social activities that occur within the proposed licence (GVP Contentions, paragraph 54; GP Contentions, paragraphs 8.4).

[50] The Government party contends (at GVP Contentions, paragraph 55) that, to the extent the evidence demonstrates that members of the native title party carry on community or social activities within the proposed licence area, direct interference is unlikely to occur for the following reasons:

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

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

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

(d) There are no Aboriginal communities within the area of the proposed licence.

Relevance of AHA and RSHA to s 237(a)

[51] The Government party contends that the grantee party's awareness of its obligations under the AHA and its willingness to enter into an RSHA with the native title party are relevant to determining the likelihood of interference with the community or social activities of the native title holders. Specifically, the Government party submits that the AHA, in conjunction with the policies and procedures adopted by the grantee party, will ensure that ground disturbing activities are not be conducted in a way that will adversely affect heritage sites, and the grantee party's willingness to enter into an RSHA indicates its willingness to consult with the native title parties to avoid activities likely to interfere with community or social activities (GVP Contentions, paragraph 55).

[52] The native title party contends that the AHA has no relevance to the question of whether the proposed licence is likely to interfere with community or social activities, as the object of the AHA is 'the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia' and it does not address community or social activities as contemplated by s 237(a). In relation to the RSHA, the native title party notes that its operative provisions are completely silent as to consultation about community and social activities, and the grantee party's offer to enter the RSHA merely evidences the grantee party's willingness to abide by the provisions of the RSHA, rather than consult more broadly (NTP Reply, paragraphs 3.2-3.4, 4.1-4.2).

[53] I recently addressed these issues in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara* at [100]-[101]. I adopt the observations I made there for the purposes of this determination. As in that matter, the grantee party's offer of the RSHA is conditional on the withdrawal of the objection; however, I note that in this instance the Government party intends to impose an RSHA condition, meaning that the native title party will have the opportunity of enforcing the grantee party's offer to enter into an RSHA.

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

[54] The native title party contends that the definition of interference in s 237(a) includes both objective and subjective elements. In this context, the native title party refers to

the interpretation suggested by Deputy President Sumner in *Tullock v Western Australia* at [105]-[106], where he held that the ordinary meaning of the words 'to interfere' in the context of s 237(a) is 'action which has the effect of hampering or affecting adversely any community activities of the native title holders.' In the native title party's submission, the 'objective' element of the test requires the Tribunal to determine whether an activity or process is prevented or hampered, whereas the 'subjective' element involves a determination of whether the interference prevents the activity or process from being conducted properly or whether that interference is unwanted. On this interpretation, the question of whether an act is likely to interfere with community or social activities does not simply involve an examination of the likelihood that an action, activity or process will be stopped, delayed or hampered on objective criteria, but may also require an investigation of whether, from the point of view of those undertaking the action, activity or process, the act is likely to stop, delay or hamper the action, activity or process from being conducted properly or whether the interference is unwanted (NTP Contentions, paragraph 3.3-3.5).

[55] I also addressed this issue in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara* at [138]-[141] and I adopt the observations I made there.

Consideration of s 237(a)

[56] I accept the Government party's contention that the mere fact that certain rights and interests are claimed and indeed registered or that members of the claim group are entitled as a matter of law to exercise those rights and interests does not support a finding that the proposed licence is likely to interfere with the carrying on of the native title party's community or social activities. The fact that certain rights and interests are claimed in relation to the land and waters does not imply that those rights and interests are actually exercised (see *Western Australia v Thomas* at 166-167; *Drake Coal v Smallwood* at [77]; *Western Desert Lands v Teck Australia* at [62]).

[57] In relation to the evidence of Mr Patterson, I do not accept the contention that the evidence fails to disclose any community or social activities. Neither the Government party nor the grantee party have identified any basis for that conclusion. To my mind, the relevant activity is the harvesting of a certain type of wood from the proposed licence area for the purposes of making a device associated with the dreaming story.

In my opinion, the evidence supports the conclusion that the activity is a relevant activity for the purposes of s 237(a), as it is evidently carried on by members of the native title claim group for religious purposes and may reasonably be interpreted as a manifestation of the native title party's registered rights and interests, including rights to access and take resources for any purpose and to engage in spiritual and cultural activities.

[58] I accept the native title party's contention that activities authorised by the proposed licence could interfere with the activity identified by Mr Patterson. The rights conferred by an exploration licence are set out in s 66 of the *Mining Act*. Although that provision does not specifically authorise the clearing of vegetation, it does permit the holder of an exploration licence 'to explore … for minerals, and to carry on such operations and carry out such works as are necessary for that purpose on such land including digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for the purpose in, on or under the land.' I accept that this would extend to the clearing of vegetation, subject of course to any statutory or other conditions imposed on the grant of the exploration licence. It is reasonable to assume that, if the grantee party were to clear the trees in the course of its exploration program, this might constitute interference with the harvesting of those trees for the purpose identified by Mr Patterson.

[59] However, I am not satisfied that the grant of the proposed licence is likely to have that result. The grantee party has adopted a policy not to undertake ground disturbing activities without a heritage survey having first been undertaken. In this respect, I note that the GDP Procedure adopted by the grantee party requires a permit to be issued where any ground disturbance or vegetation clearing is proposed. The procedure for the issue of a permit involves a heritage review, which requires an assessment of whether the area the subject of the permit has been surveyed for the specific purpose and whether a heritage survey is required. Furthermore, while the grantee party's offer to enter into the RSHA appears to be conditional on the withdrawal of the objection, the Government party intends to impose the RSHA Condition. I note that the definition of 'ground disturbing activity' in the Central Desert RSHA, which triggers the survey provisions, includes vegetation clearance. In this respect, there will be an opportunity for consultation in relation to any activities that have the potential to

affect the trees and any activities associated with them. It is also possible the trees are sites to which the AHA applies, in which case I accept that the grantee party is aware of its obligations in respect of such sites. In the circumstances, there is no reason to conclude that the grantee party will not comply with the AHA or the policies and procedures it has adopted, and I accept that these policies and procedures will ensure the native title party is consulted about any works that might have the potential to damage the trees or otherwise interfere with the act of harvesting them for the purposes identified by Mr Patterson.

[60] I also note that the proposed licence will be subject to specific conditions connected with the designation of the area as a proposed conservation park. These conditions require the grantee party to prepare a conservation management plan ('CMP') to address the conservation impacts of proposed activities prior to lodging a programme of work. The CMP must be prepared pursuant to the guidelines prepared by the former Department of Environment and Conservation to meet the requirements of the Minister of Environment for acceptable impacts to conservation estate. The grantee party must also provide an itinerary and programme of the locations of operations at least five working days prior to accessing the proposed reserve area. I am satisfied these conditions will contribute to mitigating the risk of interference with the trees.

[61] It may also be the case that no trees of the relevant kind exist within the proposed licence area. In this respect, I note that Mr Patterson identifies the trees in relation to the rockhole. Given the issues surrounding Mr Patterson's knowledge of the location and extent of the proposed licence, there is degree of uncertainty about the location of the rockhole relative to the proposed licence. I deal with this issue in greater detail in the context of s 237(b). In any case, for the reasons discussed above, I find that the grant of the proposed licence is not likely to directly interfere with the activity identified by Mr Patterson or any other community or social activities carried on by the native title party.

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

Contentions and evidence in relation to s 237(b)

[62] The native title party contends that the proposed licence contains sites and areas of particular significance to the male members of the native title party, in accordance

with their traditions (NTP Contentions, paragraph 5.8). In particular, the native title party submits that:

- a *jukurrpa* (dreaming track or songline) of immense cultural significance to initiated men is present in the proposed licence and creates and transforms the landscape in ways that are not immediately apparent to people without the requisite cultural knowledge;

- there is a site within the proposed licence that was created by the *jukurrpa* as it travelled through the landscape; and

- there are sites located within the proposed licence that are considered *ngulu* (secret, dangerous) and should not be known by women or uninitiated Aboriginal men.

[63] The native title party 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 Furthermore, the native title party submits that physical interference with soaks and creek systems within the proposed licence will interfere with the *jukurrpa* and sites of particular significance to initiated men (NTP Contentions, paragraph 5.9-5.12).

[64] 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).

[65] Mr Patterson states that 'there is lots of *jukurrpa* all through that area of the Tenement. These are really important areas for *wati* like me and I can't just tell anyone about them.' Specifically, Mr Patterson refers to a specific *jukurrpa* that is 'there in that Tenement' which travels from the east heading towards Cunyu station. Mr Patterson states that there are 'lots of creeks in the country around there' and says there is 'a good fresh water creek there in the Tenement and an important rock-hole there.' According to Mr Patterson, the rockhole is near the track which connects Marymia to the boundary of the Gingirana claim. Mr Patterson states that the rockhole is associated with a specific activity of the *jukurrpa* and deposes that people may become sick or die if they tried to take water from the rockhole without showing respect to the *jukurrpa*. Mr Patterson states that the rockhole might be damaged if a company 'came out there and started making roads or even driving around in the wrong spots' and this might affect the water in the rockhole. Mr Patterson says that even drilling or chipping rocks would make him worried about 'mucking up' the rockhole. Mr Patterson also states that the *jukurrpa* might be hurt if people were to enter the proposed licence area 'without the right Martu people' and '[e]ven taking photos without the right people there to protect the area' would make him uncomfortable, as the whole area is *ngulu* (TP Affidavit, paragraphs 6, 8-11, 16-18).

[66] The grantee party contends that, in the absence of the map referred to by Mr Patterson, the reference to the track has no probative value. The grantee party submits that, as the location of the rockhole is dependent on the location of the track, the description of the rockhole suffers from the same uncertainty. The grantee party also suggests that Mr Patterson may be referring to two rockholes, though I do not accept that is the case. The grantee party submits that the Tribunal should not find that either the rockhole or the fresh water creek is within the proposed licence area. In any event, the grantee party contends that the evidence is insufficient to establish the particular significance of any of the areas or sites identified by Mr Patterson or the likelihood of interference (GP Contentions, paragraphs 9.2-9.15).

[67] In relation to s 237(b), the Government party refers to the following passage from the decision of Member O'Dea in *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.

[68] The Government party submits that much of Mr Patterson's evidence is deficient in the manner identified by Member O'Dea. In particular, the Government party submits that Mr Patterson refers to Cunyu station and Marymia in relation to the path of the *jukurrpa* and the track but does not provide sufficient detail and specificity of the significance of those areas to allow the Tribunal to undertake the predictive assessment required by s 237(b). Further, the Government party submits that Mr Patterson simply states that the creek and rockhole are 'there in the Tenement' without deposing to where within the proposed licence those places are. The Government party also submits that the evidence in relation to the creek is not sufficient for the Tribunal to find that it is a site of particular significance. Similarly, the Government party contends that Mr Patterson does not explain how or why the whole area is *ngulu* (GVP Contentions, paragraph 65-70)

[69] In any event, the Government party submits (at GVP Contentions, paragraph 71) that interference is unlikely to occur because:

(a) to the extent that sites of particular significance exist within the proposed licence, the grantee party is aware of the existence of, and its legal obligations in relation to, those sites. The Government party submits that the grantee party has agreed to work with the native title party through the RSHA to avoid interference with such sites, which indicates its willingness to consult with the native title party;

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

(d) the area has been subject to prior mineral exploration, 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.

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

(a) 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;

(b) 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;

(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;

(d) the assertion that the area has been subject to past mineral exploration is not evidence of previous exploration activities having been undertaken in the area, evidence of which is within the knowledge of the Government party as the relevant regulator; and

(e) 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 of particular significance through applications under s 18 of the AHA for ministerial consent to destroy or damage a site without the consent of the native title party.

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

[71] 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].

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

[72] 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 59). I note that the Federal Court has since handed down judgment in the matter (see *FMG Pilbara v Yindjibarndi Aboriginal Corporation*).

[73] 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 60, 71(c)).

[74] 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)

[75] In my view, there is no basis on the evidence before the Tribunal for finding that the entire area is one of particular significance. The only evidence relating to the

significance of the area is the presence of the *jukurrpa*, and there is nothing in Mr Patterson's evidence to suggest that the proposed licence area is in any way set apart or distinct from other areas associated with the *jukurrpa*. It is also unclear whether Mr Patterson is attributing significance to the exact area of the proposed licence (which seems unlikely), a smaller area within the proposed licence (which he does not specify) or a larger area in which the proposed licence is located (the geographical extent of which is not identified). In the circumstances, I do not find that the area affected by the proposed licence is an area of particular significance for the purposes of s 237(b).

[76] Similarly, I do not accept the particular significance of areas traversed by the *jukurrpa* in circumstances where the location of these areas and the particularity of their significance are not apparent from the evidence. The reference to Cunyu station, which is located almost 100 kilometres to the south of the proposed licence, is of little assistance in establishing the path taken by the *jukurrpa* or the specific areas associated with it. This finding is consistent with the approach of Member O'Dea in *WF v Emergent Resources* (at [45]). I also find that the evidence does not establish the particular significance, in accordance with the traditions of the native title party, of the fresh water creek or other creeks that are said to be located in the country around the proposed licence.

[77] I am satisfied that the rockhole is a site of particular significance, based on its association with the *jukurrpa* and its connection with the activity described by Mr Patterson. I am also satisfied that the significance of this area possibly extends to the trees surrounding the rockhole. Although I agree with the grantee party that certain features of the site are to a large degree unexplained, in my view the evidence of Mr Patterson is sufficient to support the finding that the rockhole is a site of particular significance in accordance with the traditions of the native title party.

[78] Nonetheless, I am not satisfied that the proposed licence is likely to interfere with the rockhole. The rockhole is only identified in relation to the track coming from Marymia. Given the fact that the native title party has not been able to produce the map shown to Mr Patterson, there are real difficulties with establishing the location of the rockhole in relation to the proposed licence. The map provided by Mr Allbrook and the map produced by the Tribunal indicate that a track running from Marymia

does intersect with the proposed licence. However, there is little certainty that the rockhole is proximate to that part of the track, as opposed to another part of the track which does not intersect with the proposed licence. As the grantee party quite rightly notes, it may well be that the rockhole is so located that any interference is highly unlikely. In the circumstances, it is difficult to conclude that there is a real risk of interference.

[79] Apart from the issues surrounding the location of the rockhole, the material before the Tribunal does not suggest that the activities contemplated by the grantee party are likely to interfere with the site. I accept that the grantee party is aware of its obligations under the AHA and has adopted policies and procedures in relation to Aboriginal heritage, particularly with respect to proposed ground disturbing activities. Although Mr Patterson says there may be consequences if someone were to take water from the rockhole without 'showing respect' to the *jukurrpa*, this should not necessarily be taken as suggesting that it would constitute interference with the site. In any case, the chance of this happening is in my view quite remote, particularly in the context of the conditions connected with the proposed conservation park. Similarly, while 'ground disturbance' may or may not include activities such as rock chipping, such activities may nevertheless be captured by s 17 of the AHA. This is not to suggest that the grantee party will not need to consult with the native title party in relation to the rockhole and any other significant areas or sites in the area. However, I am satisfied this consultation will occur through compliance with the policies and procedures adopted by the grantee party.

[80] In conclusion, I find that the grant of the proposed licence is not likely to interfere with areas or sites of particular significance to the native title party.

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

[81] As noted above at [26], the native title party makes no contentions in relation to s 237(c). The affidavit of Mr Patterson does not specifically address the issue of major disturbance, although he does express concern that the *jukurrpa* may be disturbed if people were to enter and take photographs of the area without the right Martu people being present or camp in the wrong places.

[82] In evaluating the likelihood of major disturbance, the Tribunal must have regard to the particular concerns of the Aboriginal community and the local population, including matters such as community life, customs, traditions and cultural concerns (see *Dann v Western Australia* at 394, 401 and 413). However, the starting point and precondition of the inquiry under s 237(c) is the existence of direct physical disturbance to the land and waters concerned (see *Rosas v Northern Territory* at [84]). Hence, the existence of cultural concerns about unauthorised access will not on its own support a finding that major disturbance is likely to occur (see *Lockyer v Mineralogy* at [67]; *Goonack v Geotech International* at [44]).

[83] 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*). The fact that the area has been designated as a proposed conservation park suggests that the area may have some special topographical, geological or environmental features. However, the Tribunal's attention has not been drawn to the existence of these features or how they might bear on the issues to be considered under s 237(c). I accept that the Government party intends to impose conditions designed to manage the potential conservation impact arising from mineral exploration. It is also likely the area has already experienced some degree of disturbance as a result of recent exploration activity.

[84] Having regard to the material before me, I find that the proposed licence is not likely to involve, or create rights whose exercise is likely to involve, major disturbance to the land and waters concerned.

Determination

[85] The determination of the Tribunal is that the grant of exploration licence E69/3176 to FMG Resources Pty Ltd is an act attracting the expedited procedure.

Mr JR McNamara
Member
5 February 2015