NATIONAL NATIVE TITLE TRIBUNAL

***Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Faustus Nominees Pty Ltd,* [2007] NNTTA 15 (1 March 2007)**

Application No: WO04/89

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

-and-

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

Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants – WC00/10 (native title party)

-and-

The State of Western Australia (Government party)

-and-

Faustus Nominees Pty Ltd (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Daniel O'Dea, Tribunal Member
Place: Perth
Date: 1 March 2007

Catchwords: Native title — future act — proposed grant of exploration licence — expedited procedure objection application — whether acts directly interfere with community or social activities — whether acts interfere with areas or sites of particular significance — whether there is a likelihood of major disturbance to land or waters — an act that attracts expedited procedure.

Legislation: *Native Title Act* 1993 (Cth), ss 29, 148, 237
Mining Act 1978, s 20, 63, 66(d)
Aboriginal Heritage Act 1972, ss 7(1)(b), 16, 17, 18, 62
Rights in Water and Irrigation Act 1914, s 5C

Cases: *Kevin Peter Walley and Others on behalf of the Ngoonuru Wadjari People/Robin Boddington and Others on behalf of the Wajarri Elders/Western Australia/Giralia Resources NL*, [2002] NNTTA 24, (8 March 2002), DP Sumner

Moses Silver, Ishmael Andrews and Sammy Bulabul/Northern Territory/Ashton Exploration Australia Pty Ltd, [2002] NNTTA 18, (1 February 2002), Member Sosso

Silver & Ors v Northern Territory & Ors (2002) 169 FLR 1 (1 February 2002), Member Sosso

Champion on behalf of Central West Goldfields People/WA/Vosperton Resources Pty Ltd [2005] NNTTA 1, (1 February 2005), DP Sumner

Mark Lockyer & Ors/State of Western Australia/Mineralogy Pty Ltd [2006] NNTTA 133 (5 October 2006), Member Sosso

Smith v Western Australia (2001) 108 FCR 442, (19 January 2001), French J

Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon, [2006] NNTTA 65 (2 June 2006), Deputy President Sumner

Dora Sharpe and Others on behalf of the Gooniyandi native title claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western Australia, [2004] NNTTA 31 (7 May 2004), Member O'Dea

Miriuwung Gajerrong Aboriginal Corporation/Western Australia/Seawood Holdings Pty Ltd [2006] NNTTA 74 (13 June 2006), DP Sumner

Ward v Western Australia (1996) 136 ALR 557 (9 May 1996), Carr J

Delores Cheinmora and Ors on behalf of the Ballanagra Native Title Claimants v Western Australia (2005) 196 FLR 250, (22 December 2005), Member O'Dea

Cheinmora v Striker (1996) 142 ALR 21, (19 December 1996), Carr J

Linda Champion on behalf of the Central West Goldfields People/WA/Vosperton Resources Pty Ltd (2005) 190 FLR 362, (1 February 2005), DP Sumner

Little v Western Australia [2001] FCA 1706, (6 December 2001), J Nicholson

Little & Ors v Oriole Resources Pty Ltd [2005] FCAFC 243, (5 December 2005), French J; Stone J; Siopis J

Paddy Neowarra on behalf of Wanjina/ Wnggurr/ Wilinggin/ Wilfred Byuneck & Ord on behalf on Uunguu/Western Australia/ Swan Cove Enterprises [2007] NNTTA 11, (31 January 2007), DP Sumner

Wobby Parker & Ors on behalf of Martu Idja Bunyjma People/Western Australia/Pilbara Iron Ore Pty Ltd [2006] NNTTA 148 (7 November 2006), Member O'Dea

Miriuwung Gajerrong No 1 (Native Title Prescribed Body Corporation) Aboriginal Corporation/WesternAustralia/ Seawood Holdings [2006] NNTTA 74, (13 June 2006) DP Sumner

Wilfred Hicks Woong-goo-tt-oo people/Western Australia/ Geotech International [2006] NNTTA 63, (22 May 2006), DP Sumner

Banjo Wurrunmurra & Ors on behalf of Bunuba; Butcher Cherel & Ors on behalf of the Goondiyandi Native Title Claimants/Western Australia/ Wasse Stewart Askins [2005] NNTTA 90, (2 December 2005), DP Sumner

Dann v Western Australia (1997) 74 FCR 391, (8 May 1997), Wilcox, Tamberlin and Nicholson JJ

Representative of the native title party: Mr Brendan Renkin, Kimberley Land Council

Representative of the grantee party: Mr Peter Thomas, Smyth and Thomas

Representatives of the Government party: Mr Greg Abbott, Department of Industry and Resources
Mr Rod Wahl, State Solicitor's Office

REASONS FOR DETERMINATION

Background

[1] On 25 February 2004, the Government party gave notice under s 29 of the *Native Title Act* 1993 (Cth) (the Act) of its intention to grant exploration licences E80/3264 E80/3266 to Faustus Nominees Pty Ltd ('the grantee party') and included in the notice a statement that the Government party considered that the grants attracted the expedited procedure.

[2] On 17 June 2004, Butcher Cherel on behalf of the Gooniyandi native title claimants — native title determination application WC00/10 registered on 23 April 2001 ('the native title party') — lodged an expedited procedure objection application with the Tribunal in relation to the proposed licences E80/3264 E80/3266.

[3] The expedited procedure objection application was accepted by the Tribunal on 2 July 2004.

[4] On 21 September 2005 the grantee party withdrew the mining tenement application for exploration licence E80/3264. That part of the objection application the subject of this determination dealing with tenement E80/3264 was subsequently dismissed by the Tribunal on 6 December 2005 pursuant to s 148(a) of the Act. Exploration licence E80/3266 ('the proposed licence') is thus the sole tenement the subject of this determination.

[5] The proposed licence comprises an area of some 12.99 square kilometres, located 96 kilometres Westerly of Halls Creek in the Shire of Halls Creek, and is entirely overlapped by the registered claim of the native title party.

[6] The objection sets out at paragraph 7 the reasons why the native title party believes the grant of the proposed licences is not an act attracting the expedited procedure:

> 'This objection application statement has been limited because the area of the proposed act (E80/3264 & E80/3266) cannot be identified with sufficient particularity by reading the future act notice. The maps provided with the notice do not contain a key, include illegible markings and lack sufficient topographic details to enable the objector to clearly relate the map to the ground. The maps are very poor and do not allow the objectors to really know exactly what country is being talked about except for its general location. The objectors do not believe the notice meets the requirements of the Native Title Act.
>
> The objectors have connections to all the country identified on the map which includes E80/3264 and E80/3266. These connections include those maintained through hunting game, collecting bush tucker and medicines, as well as visiting and looking after sites. Exploration activity will scare away bush animals especially when people are drilling and using bulldozers. Drilling activity and costeaning will also destroy plants the objectors use for bush tucker and medicines and may also destroy sites. The grant of E80/3264 and E80/3266 will significantly impact on the objecting community's conduct and enjoyment of these activities and the objectors' spiritual connection with the land.

> Under the objectors customary law and beliefs people who are not traditional owners need to ask permission to go out on country affected by E80/3264 and E80/3266. Permission and information about this country is held be [sic] elders many of whom cannot read, write or interpret maps. The elders can only properly provide permission or further information when they know the intentions of the party and the exact area that will be affected. The grant of E80/3264 and E80/3266 without speaking to elders is against the customary law and beliefs of the objectors.
>
> There are artefact scatters in the area of E80/3264 and E80/3266 left by the objectors' ancestors. These artefacts are not recorded sites and can only be found by close examination of the area in question. These sites are particularly significant because they record the historic activities and movements of the objectors' ancestors. The sites are not easily identifiable and require specialist expertise to identify them. The action of driving across country to get to an area of proposed exploration activity as well as the proposed exploration activity itself is likely to destroy those artefact scatters unless they are properly identified, recorded and protected.
>
> The objector believes that the grant of E80/3264 and E80/3266 over the area of ground applied for will create rights, the exercise of which will involve major disturbance to the land. This includes the right to drill holes and excavate 1000 tonnes of material and other rights as defined in the *WA Mining Act* 1978. The objectors believe the extraction of 1000 tonnes of material anywhere within E80/3264 and E80/3266 create [sic] a major disturbance to the land. Specifically the land in question is as delineated in the map provided from the State in its original notice.'

[7] At paragraph 8 of the objection, the native title party set out the type of evidence it intended to adduce in support of its objection, including:

a) historical affidavit and oral evidence relevant to section 237 (a) and (b) of the Act;

b) anthropological affidavit and oral evidence relevant to section 237 (a) and (b) of the Act;

c) genealogical affidavit and oral evidence relevant to section 237 (a) and (b) of the Act;

d) linguistic affidavit and oral evidence relevant to section 237 (a) and (b) of the Act;

e) environmental affidavit and oral evidence relevant to section 237 (a) and (b) of the Act.

The native title party requested that oral evidence be given on country.

Directions and terms of inquiry

[8] The Tribunal made directions on 2 July 2004 for all parties to produce contentions and evidence for the conduct of the inquiry to determine whether or not the expedited procedure was attracted. These directions provided for compliance by the Government party by 11 October 2004, the native title party by 18 October 2004 and the grantee party by 25 October 2004.

[9] At an adjourned Preliminary Conference on 24 August 2004, the grantee party requested the directions be vacated as the proposed licence was under joint venture discussions. At this Conference the grantee and native title parties also agreed that a negotiated outcome was possible for these matters but the drafting and execution of an agreement was some months away. On 3 September 2004 Deputy President Sumner approved the request to vacate directions.

[10] A number of Adjourned Preliminary Conferences were held between 21 September 2004 and 19 January 2005. The grantee party and native title party indicated during these conferences that positive negotiations were occurring and that an agreement between the parties was possible but could take some time, given the joint venture discussions in which the grantee party was engaged at the time. At an adjourned preliminary conference on 19 January 2005 the convenor advised the native title party and grantee party that there were time constraints in this matter and that it was taking too long to resolve. The representative of the grantee party at this time advised that resolution of the matter was imminent. The convenor adjourned to matter to 6 April 2005.

[11] Between 6 April 2005 and 5 April 2006 a number of status conferences were convened, at which the grantee and native title parties continued to express their intention that agreement could be reached, subject to the resolution of some 'sticking points'.

[12] On 19 April 2006 the Tribunal proposed that parties enter mediation pursuant to s 150 of the Act. On 14 June 2006 all parties agreed to mediation.

[13] On 3 July 2006 the Tribunal reinstated directions, and on 12 July 2006 the Tribunal advised parties that directions in this matter were reinstated. I was appointed to hear this matter on 15 August 2006.

[14] Submissions on behalf of the Government party were received by the Tribunal on 31 August 2006. Submissions on behalf of the native title party were received by the Tribunal on 6 October 2006, and submissions on behalf of the grantee party were received by the Tribunal on 13 November 2006. Despite the earlier request by the native title party that evidence be given orally on country, the Tribunal received verbal advice on 14 November 2006 that parties agreed to a determination 'on the papers'. Also on 14 November the native title party sought and was granted leave to file contentions in response to the grantee's contentions and additional affidavit material by 21 November 2006. The grantee was given leave to file further contentions in response by 28 November 2006. On 1 December 2006, the grantee

party advised the Tribunal that it would be not filing any additional responsive material. The native title party did not raise the issue referred to in its application to the effect that the advertised maps did not meet the requirements of the Native Title Act.

Legal issues

[15] In *Kevin Peter Walley and Others on behalf of the Ngoonuru Wadjari People/Robin Boddington and Others on behalf of the Wajarri Elders/Western Australia/Giralia Resources NL*, [2002] NNTTA 24, Deputy President Sumner (8 March 2002) (WO01/179 and WO01/180), considered the applicable legal principles in relation to s 237 (at [7-23]). These matters have also been discussed by Member Sosso in *Moses Silver, Ishmael Andrews and Sammy Bulabul/Northern Territory/Ashton Exploration Australia Pty Ltd*, [2002] NNTTA 18, Mr John Sosso (1 February 2002). I accept the articulation of the relevant legal principles in those matters for the purposes of this determination.

[16] Section 237 of the Act sets out that for an act to qualify as being an *act attracting the expedited procedure* it:

a) is not likely to interfere directly with the carrying on of the community or social activities of the native title party;

b) is not likely to interfere with areas or sites of particular significance, in accordance with the traditions of the native title party; and

c) is not likely to involve major disturbances to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

Material provided by the State

[17] The Government party contends that the proposed licence will not give rise to any of the issues raised by s 237 (a), (b) and (c) of the Act. There are no sites registered on the sites Register of the Department of Indigenous Affairs and no Aboriginal communities within or in the vicinity of the proposed licence. The proposed licence is situated on an indigenous-owned pastoral lease and vacant Crown land.

[18] The Government party refers to the provisions of s 20(5) of the *Mining Act* 1978 in relation to this area and to ss 17 and 18 of the *Aboriginal Heritage Act* 1972 (WA) ('the AHA'), which go to protecting Aboriginal areas or sites. Attention is also drawn to the

standard conditions which will apply to the grant as set out in the schedule attached to its contentions and to the conditions which are imposed on the grant by s 63 of the *Mining Act* 1978. It states that the grant will include an endorsement drawing the grantee party's attention to the provisions of the AHA. The Government party's documentary material also includes the conditions and schedule of endorsements to be imposed on the proposed prospecting licences pursuant to the Mining Act. The Government party also makes reference to the enhanced effectiveness of its regulatory regime due to the substantially increased penalties for breaches of the AHA and its revised Guidelines for Consultation with Indigenous Peoples by Mineral Explorers (see discussion by DP Sumner in *Champion on behalf of central West Goldfields People/WA/Vosperton Resources Pty Ltd* [2005] NNTTA 1, 1 February 2005 at 71).

Material provided by the native title party

[19] The native title party submitted five affidavits, two sworn by Mr Matt Dawson and Mr Mervyn Street and one sworn by Ms Celia Jane Tucker.

[20] *Affidavit of Matt Dawson, sworn 4 October 2006*

> 'I, Matt Dawson, a Stockman of Pullout Springs on Louisa Downs Station between Halls Creek and Fitzroy Crossing, in the State of Western Australia affirm:
>
> 1. My European name is Matt Dawson and my Aboriginal name is Pagey, I worked all my life as a stockman.
>
> 2. I was born on the 1st of January, nineteen thirty-six on Margaret River Station.
>
> 3. I'm a station stockman living two kilometres out of Yiyili where I have a block of land.
>
> 4. I'm a Gooniyandi and Lunga man. Gooniyandi on my father's side, and Lunga on my mother's.
>
> 5. I'm a senior Gooniyandi and Lunga Law man. I am one of the senior people for the Gooniyandi Combined Native Title Determination Application (WAG6008/00).
>
> 6. I have been shown a map of the application area, the map I was shown is attached to this affidavit and marked "A". I know the area very well where Faustus Nominees Pty Ltd, ("Grantee") have applied for Exploration Licence Number E80/3266. ("Tenement")
>
> 7. The country which the tenement covers (Tenement Area") falls within Gooniyandi Country.
>
> 8. Under our Law I have authority to speak for Gooniyandi country.
>
> 9. I was taught Aboriginal Law in the area covered by the mining tenement in Goat Paddock by my father and granddad. They were both born in the area.
>
> 10. My grand dad was born a bit further up in *Pelinga*, the river name there is Doorroorroo, the *Kardiya* (non aboriginal person) name for that river is O'Donnell River, that runs through the Tenement Area.
>
> 11. My grand dad's European name was Jacky, his Aboriginal name was Miliang.

12. The Tenement is part of my grand dad's area, and it has been used by my family before it was a station by my family.

13. My grand dad had three boys and two girls, and he worked on that station, and there was only one *kardiya*. The *kardiya* depended on us to build up that station.

14. My skin name, *Joongoorra* connects me to the Tenement Area from my grand dad. This is the same name as the snake, my ancestor, that lives in the waterhole in the Tenement Area.

15. My father's *kardiya* name was Matt Dawson, his Aboriginal name was, *Gagolgi*.

16. My father was born in Gooniyandi country, in this side of Goat Paddock. The traditional name for the soak in Goat's Paddock is *Jilgara*. My father is Gooniyandi.

17. My father became a stockman when white men came, and the white man learned Aboriginal people are good working people, make Aboriginal people stockman.

18. My mother's side is a bit further to the north east. I'm Lunga people too. Gija and Lunga are two languages on that north-east side area. From my mother I am Lunga, and my skin name is *Joongoorra*, and my son, young Terry is *Jangardi*.

19. I'm related to the Tenement through my father. This Goat Paddock area is my father's place.

20. My son, Terry, now works on Louisa Downs Station, mustering, fencing bores, riding on horse back and all that. Under our Law, I will pass this country on to my son, like my father did to me.

21. We get the story for this country from the old people, and under our Law if we get the story we *gotta* look after the country. From that story we know how our dreaming ancestors created that country and taught us the Law. The old people passed down that country name, and the name for the places, animals and those rivers. From the Law passed on from our dreaming ancestors we know how to look after that country and make sure it does not get damaged. That is what the old people told us, if they pass on, we *gotta* keep going to this area, and follow the Law, and we *gotta* pass that story on to our children.

Community or social activities

22. When I come to be an expert worker, I went out to the Tenement Area and other stations. I got to know Goat Paddock, through my dad. He taught me about this area.

23. My father took my [sic] out to the Tenement Area many times, because he was the owner of the land under our Law. He taught me and my brothers Munro and Bruce, the Law and word that he got from the old people, when we visited places in the Tenement Area.

24. I remember my father taking me there to Goat Paddock, as a small boy, the same age as all these grandkids of mine are now. My father would always take us and show us how to work or, tell us story for his country, for his father's country. We would walk in from the north eastern side, from the other road on top of the cliff. We came that way from a place called *Dalingmun*, through the *Bindua Hill*, gorge I mean.

25. The old people and my father would sit down and tell us the story of what the country felt and meant to them. I would like to hear the stories from old people all the time.

26. Through out my life I have always thought about those times and those stories, and been guided by what I learnt from those times.

27. My dad bring me and my two sisters and five brothers lots of times to this place Goat Paddock when mum was still alive. We would go there every year nearly, after work was finished on the station, we would go there and hunt, fish, practice Law and all that sort of thing.

28. I worked on Louisa Station and visited the Tenement Area lots of times. I've been to this country, the Tenement Area, since I was a young man.

29. When my brothers were still working on Margaret River Station, we came here as a family during *walk about* time or *holiday* time.

30. We used to go up through the Tenement Area to get *bamba* rock from the gorge, just outside the Tenement Area on the north east, *telingmun* they call it. Those Mueller Ranges they go right up to the top.

31. We still use this place Goat Paddock these days, we always come and have dinner here and then camp at that old yard, marked "Number Seven" on the map. We come out here several time a year, maybe once a month. I bring my kids, and grandkids, and others from Yiyili and other places.

32. I teach my family about the stories and Law for that place. I've spoken to all that family of mine about the Tenement Area, my dreaming starts right from *Black Fella* Creek, Black Fellow Springs, Black Fellow Creek Yards which are approximately 30 kilometres northeast of the Tenement. It follows the Mueller Ranges right down to *Walu*, the junction of the Margaret and O'Donnell rivers.

33. When we come out to the Tenement Area, we go hunting bush meat.

34. The waterhole in the Tenement Area is the main waterhole for the area. During the dry season because all the animals go there for that spring, it's a good hunting spot.

35. We know where to get bush tucker; bush meat, *jumbio* [goanna] or might be *barlanyi* [snake] or *guamuddera* [bush turkey], *garnanganyja* [emu] or *wanyjirri* [river kangaroo].

36. My son, Terry saw a *garnanganyja* track last time we went out there.

37. The second last time we visited the Tenement Area we caught a goanna and kangaroo in there, and we camped down the river, near there where we catch fish.

38. We also use *gooroo* [river mangrove] that grows near that spring to poison the fish.

39. We peel the bark of the tree, chuck it in the water and get a lot of fish. They go mad all round you, they can't get a place to go anywhere. We catch a lot of big ones; *balga* [barramundi] *big ruj* [catfish] and bream.

40. I have seen on the map provided by the Grantee indicating that the Grantee will come and take water from the waterhole. I am concerned that if the Grantee does this, especially at the wrong time of the year, then there will not be enough water left, and this will mean that we can no longer go fishing in this area.

41. If the Grantee takes the water this will probably make the mangroves die off and we won't be able to come to this area to get the bark for fishing. Also we won't be able to use the bark for fishing in the Tenement Area.

42. I am concerned that if the water is all gone, or only a little is left the animals won't come to this area any more and this will mean we won't be able to hunt for bush tucker in these areas.

43. I am concerned that if the Grantee comes onto this country and disturbs it with big trucks and drilling rigs it will scare away all the animals and might kill off the bush tucker, and we will no longer be able to hunt or go out and camp in that area. I am also concerned that the Grantee might want to fence off an area, and prevent us from going to places in the Tenement Area.

44. If these things happen I will no be able to bring out my children, and the other kids to these areas. I won't be able to teach them about hunting, and where to collect bush tucker, about the trees in that area, and I won't be able to teach them the stories about those places in the Tenement Area, like the old people told me to do under our Law.

Sites of particular significance

45. There are places within the Tenement Area, and some places just outside it, which are very important to us Gooniyandi mob.

46. Where we camp at *Nyaligi*, just southeast of Goat Paddock, is where that flying fox, they call him *Bigermee*, during the Dreamtime, he speared that crocodile with a spear. The flying fox was the best dancer and crocodile was jealous. All the flying fox family talked to *Bigermee*, he had to go back and get his spear from spearing that man, the crocodile. In the Dreamtime, *Bigermee* he was a man you know. You can go up to the south west, to see that place where the crocodile got speared.

47. There is also the story about that crocodile and that two turtle, and that *ganinyi* (rock hole) where they put that crocodile, near that place marked on the map UTAH 1 and UTAH 2. That's the main place where you find that deep water there. That crocodile didn't get killed by *Bigermee*, he got wounded. The two turtle then bring crocodile up along the Margaret River, they *bin* looking for big water for that crocodile. They follow this Mueller Range all the way, right back to that place marked on the map, Goat Paddock, "No. 7 Yard". The Aboriginal name is, *Jilgara*. They continued on, and the two turtle try with a stick to find a deep place, a deep water hole. That place they found was that water hole called *ganinyi* near the cliff wall.

48. That *Bigermee* story is the story that we passed on to all these Yiyili school kids. We also taught those kids that story for that crocodile and that two turtle. Those kids learn those stories and make a dance for those stories.

49. Jilgara, which is inside the Tenement Area is also a special site because there is a Dreamtime story in there, and my ancestral snake is in that spring now. The snake came from the river and went up to that spring, tread down the water hole to that spring. The snake, he *bin* holding water, the main water. The snake is called, *Joongoorra*, his name. This is a]so my skin name, so he is my ancestor. Another name for that snake is *Galaroo*. Under our Law, I have to look after that snake.

50. When the summer time real bad, bad weather, we use to go and dig in that spring now and talk to that snake if we want rain, and that sort of thing. He can always make rain that snake.

51. We still talk to that snake. When we visit that place, I told all the kids not to make too much noise in there so they wouldn't disturb that snake. Every time you come out here you have to have water put on your head, because of the Dreaming time. That's our culture you know, so the country recognises you. When you're a stranger to country, some time you get headache, a bit sick, because you don't do the right thing.

52. There are other Dreaming stories in that place. Another story in there is about a brolga, you see in the lagoon; the blue one with the wet head. That place called *Moowarra* is a dancing area for the *goorranda* [brolga] and *minaji* [porcupine].

53. A Dreamtime story where *that mob bin* dancing in that area, a bit further up near *Walus* waterhole in the Mueller Range, the same hill in the tenement, My family are the Traditional Owners of Goat Paddock, and my father and my granddad told me story for that brolga and porcupine. I hear interesting story from old people all the time, that's how I come to know about my grand dad's country.

54. There are other main camping areas and Dreaming tracks a bit further up from Goat Paddock. Back towards Gordon Downs there is another camping area and special place for the Dreaming Kangaroo from Gija and *Lunga* side. One kangaroo has a short tail another one has a long tail, and there is a bird called *Jingaroo*. He use to go in with a stick, like that on the ground, and *get-a* water. That's where all the springs come from, from that Dreamtime story from Gija and Lunga side.

55. My father introduced me to that snake at *Joongoorra* in that spring at Goat Paddock. Just like when we there we introduce others to that place, pour them with the water you know. We do that because that's the Law. Like talk to that snake or something. With this thing, once you got water on your head, that smell which is your family spirit goes to that snake. He knows you're a visitor and you can visit the country. If you don't do this, there will be a big rain. This rain is because it's like you being *cheeky* by not say hello. The snake gets angry because you're trespassing. This will be a problem for the Grantee, and the big rain will cause problems for everyone. They got to be careful you know, they got to get permission from Traditional Owners to go there, around that *Joongoorra* at Goat Paddock.

56. If *kardiya* come to these places, to any named place, unless they speak to me or the other Traditional Owners, they won't know where those special places are. If they drive a motorcar, or

do some digging, they might destroy some of those special places. They should talk to us first, so they don't go to places where our Law says they can't go. If they disturb those places under our Law this can cause big trouble for us.

57. Any new people who come along to any named place like that that must do something like introduce themselves to the snake or something like that. The new people must be introduced by the people who know the special places and the stories. If they don't, just like with the snake, there can be big problems, like big rain. I am worried that if these new people go to these places they might also get sick or die.

58. There are also Law ceremonies in that place called *Jilgara* [the soak in Goat Paddock]. In this place we teach young *fellas* how to hunt for bush turkey, kangaroo, emu or goanna. Get everybody involved. Under a big shady tree, get every body involved in ceremony.

59. Under our Law young man not allowed to have bush meat when their young. We get old people involved to teach young people how to hunt for bush tucker meat. When a young *fella* full grown man of seventeen, or eighteen, nineteen, they get involved in that part. They are then taught by the older men. That thing, women not allowed.

60. If the Grantee come to this place and drive around or drill big hole, might disturb or wreck that Law place, so we can't teach our young *fellas* about our Law.

Major disturbance to land or waters

61. This *Moowarra* Range here, *kardiya* call it "Mueller Range", on the map. Where they look for that mineral is called "Number 7, Goat Yard" they *bin callin* it on the map. A long time ago, one *old fella bin livin* there. His name was William Cox. There use to be a *big mob* of goats, but not a problem. This was a long time ago when William Cox was there in Louisa Downs Station.

62. If that Grantee go out to that area and take water that will be a big impact on that area. If the Grantee drill big hole in that place, maybe the water from underground will go too. No more fish, or hunting out there for me and my family.

63. If the Grantee is not introduced properly at those places, or disturb one of the special places under our Law, then that place where we camp and hunt might be big change. I won't be able to go hunting there any more, and I wont be able to take the kids out there to tell them stories and teach them the Law in those places.

64. I am aware of the types of things the Grantee can do under the Mining Act in the Tenement Area if the Exploration Licence is granted.

65. *Kardiya* companies need to recognise traditional people have the Law for their traditional area. We belong to that area and I'm the main person under our Law for that place. People need to ask me before they go into that area; me, young Terry or Mervyn Street.

66. If the Grantee go there, they might make a big fence around there, and we can't go in. If people go in there without asking, they are acting out of place. If they take that mineral out of the ground, what we get? What Aboriginal people get?

67. If they bugger that Dreamtime story; that spring mightn't be lasting if they drill through there.

68. The mining people are not talking straight to the Traditional Owners and that's not fair. They make enemy of Aboriginal people by destroying the Dreaming.'

[21] *Affidavit of Matt Dawson, sworn 16 November 2006*

'I, Matt Dawson, a Stockman of Pullout Springs on Louisa Downs Station between Halls Creek and Fitzroy Crossing, in the State of Western Australia affirm:

1. I refer to the affidavit affirmed by me on 4 October, 2006 ('my original affidavit') and filed with this Tribunal, which is true and correct.

2. I have again been shown the map of the exploration licence application area (E80/3266) that was attached to my original affidavit.

3. In or about September, 2006 I visited the exploration licence application area.

4. The two places referred to paragraph 47 of my original affidavit, *jilgara* and *ganinyi* are both within the exploration licence application area.'

[22] *Affidavit of Mervyn Street, sworn 4 October 2006*

'I, Mervyn Street, Artist and Senior Cultural Advisor, of Pullout Springs on Louisa Downs Station between Halls Creek and Fitzroy Crossing, in the State of Western Australia affirm:

1. My European name is Mervyn Street. I had no second name, so they gave me my name. People know that *kardiya* have a second name, so mine was given to me by a missionary who used to be in Fitzroy, me and David got our second name, 'Street'.

2. My skin name is *Joowoorroo*, or sub-section identity. *Joowoorroo* was given to me, my granny gave me the name from an old brother passed on to me. Under our Law, what happens with people is that the name must be that of another bloke that passed away. The name will go to another boys or girls that come up.

3. My Aboriginal name is *Jowddji*. I have name from that other old boy but I can not say his name because he's finished.

4. I was born lst of July 1950, in Louisa Downs. That's my great, grand mother's country and my grand mother's buried there, as is my great grandfather. He is buried in that place called *Galngoorra*, at Louisa Downs there.

5. I was born on Louisa Downs Station, under a boomerang tree, right underneath it, near the old Aboriginal Reserve. I was born in the bush, not in the hospital. That tree grew then died off. But then another tree come up there, a new tree got up there and grow.

6. I am one of the senior people for the Gooniyandi Combined Native Title Determination Application (WAG 6008/00).

7. Under our Law I have authority to speak for Gooniyandi country.

8. I have been shown a map of the exploration licence area, the map I was shown is attached to this affidavit and marked "A". I know the area very well where Faustus Nominees Pty Ltd, "Grantee" have applied for Exploration Licence Number E80/3266 ("Tenement Area). I have visited this area many times.

9. My mother taught me that my Dreaming travels up the river and finishes in that place in the Tenement Area. I teach this Dreaming to my family, and we continue to visit and use this area.

Community or social activities

10. The Tenement Area falls within Gooniyandi couniry.

11. Gooniyandi country is where Gooniyandi language was put *ngamoo-noonggoo*, in the Dreamtime.

12. I live with my family and other Gooniyandi people at Pullout Springs which is about forty-five kilometres north, from the Tenement Area.

13. In language my mum is like a *Nyawajarri*, skin name. My Granny *wabala*. Granny's, granny, their great, great grand mother, you know like great, great mothers and now grandmothers, and grandfathers, have past on that story for that Tenement Area, Goat Paddock, and given it to my mum. She passed it onto me.

14. I was told this story because we was living in that area and camping in that area, a long time ago when I was a child.

15. In those times some people had a motor car round this way. We spent time holidaying in the Tenement Area. My people, my granny and my grandpa lived in the Tenement Area during the *holiday* or *break* time, before we had to go back to work on the station again. My old people were living there before me.

16. The Tenement Area has a lot of good places, good fishing out there, you can live in that country, like my people used to. There are also a lot of story to tell for that place as well.

17. I never been to school but my school was from my old people, they teach me how to go hunting fish, learning from going hunting and looking for bush tucker and learning about country name, all this country name and stories.

18. We go there and visit the Tenement Area, we go to the spring there, and all around in there.

19. That spring right there is called *Jilgara*, where the mapped annexured and marked "A" is marked and the words "potential water source" inside the tenement.

20. There's like a hill right round that spring. In the no water time, like a hot season, this is the only water, the last water, the spring in there. All the other places dry out, but the spring keeps holding that water right through the dry.

21. The spring carries a little fish, like a *boonda* (perch), it is a little creek, but there is bush tucker like a *gooanggi* (bush fig) and *yimarli* (black plum) to eat. All those plants grow there. There is also some other bush tucker round the creek place like a *maroorra* (native tree with orange fruit).

22. There is also good shade there, like an umbrella. There are a lot of animals, they come to eat bush tucker out there, and to drink water. There are kangaroos, emus and other birds. This is a good place to hunt.

23. Where they got that spring, *jilgara*, Goat Paddock, there is also that *gooroo* (fresh water mangrove) like live in the side of the sea. There is also *maroorra* tree (Leichardt tree) out there. That place has all the good plants, for bush tucker, it makes you feel really good when you walk around there, and you can collect the bush tucker like the old people taught me, and like I have been teaching the young kids.

24. When we go out in that area and it's dry and no water round there, we know where to find water, we go there, to Goat Paddock, the spring. We don't want anyone messing around with that place.

25. I go out to the Tenement Area with lots of other Gooniyandi people, and kids and everybody we use that place. We spend a couple of days so we can fish, hunt and have a look-around. It is a very big place. When you look at in the map, its only little, but when you get there, it takes you all day. Last year we went round there, we all love to go there.

26. We often go camping at two river join, where Margaret River and O'Donnell River join, just outside the Tenement Area. It is a good camping place, we drive out there, spend more time there, we had dinner there.

27. We also go out to other places in the Tenement Area, and look for bush tucker. We cut trees for witcherty grub. We go hunting and take kids out there for *look-round*.

28. Before learning about country, I learnt from my granny and my mother taking me, like had good parents, every time they have a lot of patience, they always stop and .give me all the name you know for all this area down this river (Margaret and O'Donnell Rivers). They showed me how to hunt and look for right food, provide medicine and live on the river, hunting in the river. They taught me how to go out in the land, on top of the land, all round the bush you, looking for *wawanyi* (goanna), bush tucker. They taught me what season to go hunt for the right food and right bush feed.

29. When they took me to some places around the Tenement Area they passed on a lot of stories from there. They taught me something from *ngarri doogidgilari* or moving rock. That rock is just like a gate or a hand, when the water rises, the rock is like a gate and it brings all the other big fish back to main water hole.

30. They also taught me that around the corner from that rock there is a place called *jirloo* where a little snake lives in a spring on the left side of the Margaret River near what the *kardiya* call "Me No Savvy Yard". On the right side there is a story about a brolga, they call him *gorranda*. When a snake ran through that place the brolga was frightened and spilt water from his beak making a gorge. That place is named *jarrgamigiiami* which means 'run away foot'. There is a painting of a crocodile in that gorge. We often camp at that gorge.

31. From there heading back towards the Tenement Area, is a place called *junda*, that's a hill where two Dreamtime brolgas collected bush onion. Nearby is *minarroorroo*, where the old people camped. Further on, just west of the bottom left of the Tenement Area is *ngoolamarra*, and that's where the story come from about the two turtles and one crocodile and the bat.

32. When I was young I went out to this country around the Tenement Area all the time with my mother and granny. When I was listening to the old people, I would listen to all the things they talked about. These things, and what happened is really important to me.

33. When I was bigger, my mother took me up to the Tenement Area, later on when we had that culture trip. We went down to Goat Paddock. We had two old lathes there, my mum and Topsy's mum, Renee, a senior Gooniyandi woman. Topsy Chestnut, now a senior Gooniyandi woman, was there too.

34. The story about that place was so important to me I told mum to sing, sing the song for me, about that crocodile and bat. I told my mum to put it on the video so I can have it all the time. We had *big mob* on that trip but the other mob went along, they keep going there to another place. But we had very important place to sit down and get the real story in Goat Paddock.

35. When we arrived at the spring at Goat's Paddock we had dinner and mum told me the very last story. I still have that video. This was the first time I heard the end of that story, and my mum sang me into this country.

36. That story my mother sung was the same story was given to me when I was little. My mother grew me up with that story, and she made sure that I knew that song so that I could sing it too. It's true that story. My mother left something of that story for me. We stayed there and slept. We fished for the little *boonda* (perch).

37. That place where my mother told me the story is called *jilgara*, *kardiya* (non aboriginal people) call it Goats Paddock.

38. And that's the story that passed on to me from old people. They were telling me to keep going to this area any time when you get older, or you become a family man, you can go to this place and give your family the stories. They told me, you can give them the stories about country and all the Dreaming sites all along this river.

39. When I'm at the school I tell the kids the story of this place, and we take kids out to the Tenement Area and the place where the story is when we can.

40. I've got my nephew here, and my two nieces, my sister and son there and, my grandson. They're all part of this country, so I pass story to these kids about this country along the Margaret and O'Donnell rivers.

41. The bat and crocodile story is very important for the kids. My grandson, John, he got that story from me and wrote the words for the Crocfest in Halls Creek last week. Other kids in my family, painted the backdrop for the performance and danced the song. Howard, my other grandson, was dancing.

42. Under our Law I must pass on these stories, and teach the young people out there on the country what the stories are about.

43. The Tenement Area is very special country and I am concerned that if the Grantee comes out on to this country without talking to us first, and maybe takes some water, drill them deep hole, damages the bush tucker and scares away the animals, I won't be able to go out to the Tenement Area any

more. I am worried that I won't be able to pass on the stories to the kids, like my grand-mother and mother did to me.

44. If we can't take kids out here, I'll be very upset because we'll be loosing our culture. At the moment, this is a place where we can come to. Kids need to come out and see things. This place we tell stories to our next generation and that would have gone, kids need to come out and see this place. And this has a strong Law this *Lunga* country. This place *gotta* strong culture. Culture side and looking at the station side, because cattle live in that valley there, people go and muster in that country there. Two things we're worried about.

45. This water that is marked by the Grantee on Annexure A as "potential water source", comes from that *Jilgara*, what *kardiya* call, a spring. That water is very important, all year round even in the summer when there's no water round, this water is still coming out of the ground.

46. I am very concerned that if the Grantee drill around here, it will take water out from here, and there will be big problems with the water. If they make a big hole in the ground, water might change, and all water might go. All this thing, bush tucker and plants will get dead and gone. All these trees with good shade and fruit will be dead. What they gonna do, drill around here and take, they will dry this up, and take all the fruit trees, fig trees, all dry. We will lose everything, drinking water for the people, for the birds and animals. No more fishing or hunting.

47. I think this would be very bad, if we lost that place where we go fishing, it would be very hard to go in there. We look at that place as a very important for people to use. I am worried that if anything like this happens we won't be able to go back out to that area for a long time.

Sites of particular significance

48. I have read the affidavit of Mr Matt Dawson, and I acknowledge and agree that the place the old people called *Jilgara* is Man Dawson's place. The *kardiya* name for that place is Goat's Paddock. I agree that, as Mr Dawson states, his Dreaming story comes from the north east side of the Tenement.

49. My Dreamtime story, for that area, and into the Tenement Area, comes from the other side, from the south east side of the Tenement.

50. Mr Stanley Holloway and Mr Butcher Cheryl, who are Named Applicants for the Gooniyandi Native Title Claim, also know that area around where my Dreamtime story follows.

51. In this place there are burial sites. Both Gija and Gooniyandi people used to live in and around the Tenement Area, all along the rivers. Those old people were shot and poisoned, and killed. There is a massive grave from a long time ago. I can't talk about where those burial sites are. Matt Dawson got family and I got family here. This area is in Gooniyandi country.

52. There is a story along the Margaret River, about two animals, one owl that lives in the log, and the other is a water rat. They were told by the stalk to plant that *gooroo* and *marroorra* tree up the *doorrooroo* (O'Donnell River) towards Goat Paddock. The story runs all along the river, along the O'Donnell River in the Tenement Area, past where the two rivers join, and down south along the Margaret River towards Ylyili. Those *gooroo* and *marroorra* trees finish right at *nyaligi*, just to the south east of the Tenement Area. That place is very special to me, and under our Law it is my job to look after it and teach my kids about it.

53. Just outside to the south west of the Tenement Area on the Mueller Range, there is a point, which is named *Moowarra*. This is a special place in the Dreamtime story about the turtles and the goanna that brought that crocodile along and finished up at *Ganinyi*. Those animals stopped at *Moowarra*, The story runs back through *Moowarra* around to Margaret River and O'Donnell River.

54. In that Tenement Area there is a big wall or cliff face there, in the area directly behind where "UTAH1 and "UTAH 2" are marked on the map attached to this affidavit. You can see that big wall from the hill near the spring at Goat Paddock, you can easily see it from high up there. There is a rock hole there that comes from that story of two turtle and the crocodile. That place is where they bring that crocodile, to put him in that place. The two turtles stopped at that wall, one short necked and one long neck: one long neck is *Walarabi* and short neck is *doowi*. There is a black thing there, that mark, and that's where in the Dreamtime one turtle dropped that bar, to hear the

sound of how deep that water was for the crocodile to live there. The turtle was checking out how deep the water was, to see whether it was deep enough to take a crocodile into that water.

55. At the end of that story, they all sat down, the two turtle and goanna, with that crocodile in that area *kardiya* call Goat Paddock. When they anived they were still people at that time, but at that place they turned in to animals — turtles, crocodile, *giwili*, goanna.

56. That place is where the Dreamtime story people, my ancestors, stopped and turned into animals. Other Dreamtime mob kept going past that place. That's where my mob, my ancestors had to call themselves, "I'm turtles and I'm crocodiles and I'm goannas". When the Dreaming people turn in to an animal, that's what gave them their skin name.

57. All the Gooniyandi people, even all those kids living in Yiyili have a skin name that relates them to the ancestral Dreaming Beings that stopped in Goat Paddock.

58. My skin name comes from that crocodile. My mother's skin comes from that turtle. The two turtles took us to there and put us in the water.

59. My grandson John's skin name is *Joowoorrroo*, that relates him to crocodile, porcupine and catfish.

60. Other people skin name comes from the goanna, who is the cousin, but still same skin like us. Also there is the water goanna, his skin is *Joongoorra*, and is also our cousin.

61. Another big Dreaming story, my story, but part of the Gooniyandi stories, also happened right there in that place in Goat's Paddock. In that place, that is where the turtle said to goanna, you must give your head to the crocodile because he is the one that has to live in the water and you'll be on dry land. The crocodile and the goanna swapped over heads then. I'm related to that area by that Dreaming. It is from my mum, passed on from her great grandmother, right back to my great grand mothers and fathers.

62. I teach those kids that story, and this year they did part of that story at the Crocodile Festival. They all sing song the old people still pass on when we all go out to that place to camp.

63. People might reckon this country got no name, but it's all got name. That place down there called, *Balmoongoo* (where Margaret River and O'Donnell River run together) running down here, where I will take you and we are going to stop.

64. I am trying to explain why these places in the different stories, inside the Tenement Area, are so special to me and my mob. From these places we get our name, so we know who we are and who our ancestors are. Under our Law we have to look after these places.

65. If strangers come on to that country and mess around they can cause big problems. I tell you one example. A snake travelled through here right up to where that spring is in Goat Paddock. If the Grantee starts digging near that place, where the water is coming out, it is dangerous. People might go blind. Its only a little spring, and it feeds from that hill, its sacred. If they disturb that area something might happen to those Grantee mob.

66. On the map of the Tenement Area, attached to this affidavit, there where the Grantee has put that mark, directly behind the points marked "UTAH 1" and "UTAH 2", there is a *Joongoorra*, there, where they're going to go or drill. Under our Law, they need to ask permission to go to that place, where they have that mark there is where that two turtle and crocodile, that *migalardi* and all that animal stop here.

67. I am concerned that if the Grantee people touch any funeral place, some of my people might get sick. Only us mob know where those places are, so Grantee mob might walk over a funeral place, or maybe drive over it. That is not allowed under our Law. Our funeral place not like *kardiya* funeral place, no big stone. But we still know where those places are.

68. The Grantee mob, they need to speak to us Gooniyandi mob. They need a clearance for their safety.

69. If they driving around, or drilling and they break our Law they might get sick and die because they might wake up a spirit living there.

70. At the spring at Goat Paddock is the place of the water snake. Under our Law we have a way of talking to the spirit, to introduce ourselves so there is no trouble. That's why the old fellas always come and put water on your head, to protect you. You go without water on your head you might get sick, bad sick.

71. If Grantee people get sick, or if our people get sick because of what Grantee does, we will all feel very sorry in our heart. If Grantee goes out to that area without talking to us first we will have big worry all the time.

Major disturbance to land or waters

72. Well every time after working, people from the community, we always go use that for fishing and camping. And people work there too *ya-know*. During working time people go out there, taking to work around there, mustering there. I don't know what's gonna-happen if mining goes there, what gonna happen? Lot of people own that area. One or two person are here and another person own through there, a lot of hard question *ya- know* to answer of it.

73. We need a rule you know so we can always use this area.

74. If they really want to drill there near that Dreaming wall, to me its better for me to give them clearance and fence around that Dreaming areas, those places from our stories.

75. We can have a good relationship together where the Grantee do his business and I do mine. Then I can still bring kids out here, If they don't talk to us, then it's not going to work; my culture and their culture together. To me it's very important to have this place for the kids because you never know what will happen. We are getting old you know, when I go what will happen to the story for these kids?

76. When *kardiya* get a map they think nobody own that land and they can go where they like and go *round* there. But people own that country, right through the Claim, and all around. What I'm saying, is the Grantee they have to talk to us and do a heritage clearance first so they can stay on that boundary, and not wreck our special places.

77. I don't want them coming round here, asking what you doing here? They need to respect this is Gooniyandi culture and Gooniyandi Law that applies to this area. They need to come into the Tenement Area with the right attitude to develop a strong relationship with the Traditional Owners. Traditional Owner's need to say where they not allowed to dig here, they not allowed to dig there, then they can stay on that boundary inside that boundary.

78. We love this country, that Grantee mob don't look at this country like us, they look at something else, something inside. They should talk to us before they come on to our country.'

[23] *Affidavit of Mervyn Street, sworn 16 November 2006*

'I, Mervyn Street, Artist and Senior Cultural Advisor, of Pullout Springs on Louisa Downs Station between Halls Creek and Fitzroy Crossing, in the State of Western Australia affirm:

1. I refer to the affidavit affirmed by me on 4 October, 2006 ('my original affidavit') and filed with this Tribunal, which is true and correct.

2. I have again been shown the map of the exploration licence application area E80/3266 ('the tenement') that was attached to my original affidavit.

3. In or about September, 2006 I visited the exploration licence application area.

4. Some of the burial sites referred to in paragraphs 51 and 67 of my original affidavit are within the tenement.

5. The sire referred to in paragraph 52 of my original affidavit passes through the tenement.

6. The site referred to in paragraphs 54 and 66 of my original affidavit is within the tenement.

7. The site referred to in paragraph 61 of my original affidavit is within the tenement.'

[24] The native title party filed a statement of contentions with the Tribunal by email on 6 October 2006. I have read and considered this material and will refer to it during the course of the reasoning that follows.

Material provided by the grantee party

[25] The grantee party submitted to the Tribunal a statement of contentions accompanied by four affidavits sworn by Graeme John Hutton, Campbell Robert Algie, Miles Alistair Kennedy and Peter Sisley Thomas. I believe in this matter it is important that the grantee's relevant evidence be set out fully. I have omitted setting out the contents of Mr Thomas' affidavit as it largely summarises the contents of the others, although to the extent any of its contents are probative, I have referred to it in the body of the reasons. In its statement of contentions the grantee party adopts the contentions filed on behalf of the Government party. It contends that the Tribunal does not have before it any evidence on which it can reliably be found that there exist any sites which are likely to be interfered with by the grant of the proposed licence. The grantee party makes reference to its track record and to negotiations between the native title party and grantee party in support of its stated primary contention that the grant of the proposed licence is an act attracting the expedited procedure. It contends that it is unlikely that there will be any exploration in the area of the proposed licence and, in the event that it does occur, it is prepared to take any necessary steps to ensure such exploration is carried out in a manner that minimises disturbance to the native title party, and protects any area of significance to them.

[26] *Affidavit of Graeme John Hutton, sworn 9 November 2006*

'I, **GRAEME JOHN HUTTON,** of Broome, in the state of Western Australia, Company Director and Geologist, being duly sworn, make oath and say as follows.

1. I am a shareholder and director of Faustus Nominees Pty Ltd (ACN 008 874 315) (**Faustus**). I control Faustus and swear this Affidavit to oppose the objection by Native Title Party to the application of the expedited procedure to the application by Faustus for exploration Licence E80/3266 (**ELA**).

2. Resource and Investment Company NL (ACN 085 806 284) (**R&I**) and Faustus (jointly the **Joint Venturers**) are party to a joint venture (**Joint Venture**) which is targeting diamonds.

3. R&I is the manager of the joint venture but I direct the overall strategy for exploration by the Joint Venture.

Goat Paddock

4. One of the Joint Venture projects covers a topographic embayment feature known to me (and herein referred to) as **Goat Paddock**. That feature is covered by exploration licence E80/3153 (the **Granted Tenement**) - which is registered in the name of Faustus - and the ELA (herein the ELA and the Granted Tenement are jointly referred to as the **Tenements**).

The Target at Goat Paddock

5. The Joint Venture has undertaken a ground magnetic survey (**Survey**) over the Granted Tenement which reflected an anomalous (the **Anomaly**) magnetic feature.

6. The geophysical target (**Target**) derived from the modelling of the Anomaly is interpreted to be consistent, possibly (there are many other possible explanations all of no interest to the Joint Venture), with the presence of an intrusive rock called kimberlite at a depth, to the top thereof, of not less than 200 metres from the natural surface.

Likely course of exploration endeavour

7. The Joint Venture wishes to drill one hole (the **Hole**) on the Granted Tenement (not on the ELA) to intersect the Target to test whether the Anomaly is explained by the presence of kimberlite.

8. The outcome of the Hole will be cut and dried – if the Hole does not intersect kimberlite there will be no purpose in drilling further holes to test for the presence of kimberlite. If there is kimberlite at the depth postulated by the model, the Hole will intersect it. If Goat Paddock is explained by the intrusion of kimberlite, then it will be there will be a very wide zone of kimberlite and intersecting it will not be difficult.

9. If the Anomaly is not explained by the presence of kimberlite, then Faustus and the Joint Venture will walk away from the Tenements and conduct no further exploration thereon and neither will have any further interest therein unless an entirely unexpected and unlikely discovery of a potentially economic occurrence of another mineral is made.

10. On the other hand, if kimberlite is intersected by the drilling of the Hole, it is envisaged that:

    (a) further drilling will be undertaken to get a bulk sample;

    (b) this would entail the drilling of either:

        (i) a further single hole of about 1.5 metres in diameter if a hole of that size can be drilled to the desired depth; or, failing that,

        (i) a number of smaller holes, which can be drilled to the desired depth and gather the required amount of sample.

11. The object of the further drilling will be to generate sufficient bulk sample to test for the presence (or otherwise) of micro and macro diamonds.

12. It is inconceivable that Grantee Party would seek to fence on any part of the ELA in exercise of its rights upon grant of the ELA save and except to give effect to the wishes of Native Title Party to protect an area of interest to Native Title Party.

13. Grantee Party would not use any water in an irresponsible manner.

Likelihood of a commercial discovery

14. Statistically and in reality:

    (a) it is highly improbable that the Anomaly is explained by the presence of kimberlite;

    (b) if the Anomaly is explained by the presence of kimberlite then it is highly improbable that such occurrence is diamondiferous;

    (c) in the unlikely event that the Anomaly is explained by the presence of diamondiferous kimberlite, is it is an extremely remote possibility (and indeed highly improbable) that such occurrence would be economically viable.

15. A diamondiferous occurrence, the top of which is at least 200 metres below the natural surface, would have to be both significantly rich and significantly large in order for it to be economically viable. It is very rare indeed to find such a mineralised occurrence.

16. For this reason, whilst there have been a number of underground diamond mines in the world, the majority, by far, are open cut mines.

17. In short, it is an extraordinarily remote possibility (or put another way, extremely unlikely) that:

    (a) any holes other than the Hole will be drilled; or

    (b) any portion Goat Paddock will ever be mined for diamonds.

Likely mode of mining

18. In the highly improbable event of an economically exploitable body of mineralisation being discovered, the mining of that mineralised body would (because of the depth to top of target) have to be via an underground (as opposed to an open pit) operation so that disturbance to the natural surface would be restricted to:

    (a) the temporal construction and presence of facilities on surface necessary to support such an operation - those facilities could, in my experience, likely be housed on an area not exceeding twenty acres in aggregate (that is an area of about 200 metres x 200 metres) and the location of such an area could be determined to accommodate the desire of the local community; and

    (b) a small surface opening to the underground mine – much like a road tunnel going into the ground – within the above area.

19. It is not useful to speculate at this time as to the potential life of the mine if a discovery is made and a mining operation is established.

Rehabilitation

20. The surface of Goat Paddock is flat and sandy - there is no outcrop in the valley of the embayment. The area is essentially covered by spinifex, a few shrubs and small trees. There will not be a lot of physical damage to the surface of the embayment (or to the area of the subject of the Tenements otherwise generally) or the vegetation thereon as a consequence of any exploration or mining effort by Faustus or the Joint Venture.

21. The wet season climate at Goat Paddock sees heavy annual rainfall of about 20 to 25 inches.

22. Based on my experience generally and my knowledge of Goat Paddock the drilling of the Hole and any further holes will be likely to cause only minimal damage to the natural surface and the environment with any incursion caused by the drilling (and associated activities), upon rehabilitative work being undertaken (as required by the Mining Act and which would in any event be undertaken in accordance with modern practice), likely being largely obliterated by the wet season following rehabilitation such that it would soon be undetectable – ensuing wet seasons will almost entirely obliterate evidence over time.

23. The evidence of the activity left by Utah's drilling in the 1970s is a legacy of rehabilitation practices of the time and the standards prevailing today. Had Utah rehabilitated the areas impacted by it in accordance with today's standards evidence its presence would long since have been obliterated.

My knowledge of Goat Paddock & interaction with the locals

24. I have been to Goat Paddock four or five times by helicopter since the beginning of about 2004.

25. I went to Louisa Downs Station Homestead on about my third trip to Goat Paddock for the purposes of establishing, at that location, a staging point for the trip to Goat Paddock. We dropped a drum of fuel off there. On the occasion of my attendance at the homestead, I was in the company of field hand and the helicopter pilot. We were met at the homestead by a number of Aboriginals who conducted themselves in a manner which led me to believe they held positions of responsibility and authority.

26. We introduced ourselves to one another and I explained to them what we were doing there. I produced a map showing them the area of interest (namely Goat Paddock) and explained our

interest in and plans for that area. I asked whether we could use the homestead as a refuelling base and they said there would be no problem with using the station as a refuelling depot.

27. They did not express any concerns about Goat Paddock being explored. Indeed they were very warm and friendly and conducted themselves in a manner which, in my experience, was entirely consistent with them being happy about Goat Paddock being explored. In my experience, if they had been unhappy about anything said to them, they would have behaved entirely differently. In my experience, Aboriginals express displeasure by dismissive in their nature and generally ignoring you. They displayed none of these characteristics to me.

28. On the four or five occasions that I have flown into Goat Paddock by helicopter I have never seen anyone there other than persons representing the Joint Venture or Faustus.

29. I believe it is unlikely that there are any sites of significance to the local community within Goat Paddock except at the north end where there is a spring. The spring area is a likely place for use as a camp site as it is shady but there is no reason to use it if it is a site of significance; it can easily be avoided by the Joint Ventures.

30. My contact with Gooniyandi mob has been limited to my visit to the Louisa Downs Station as detailed above. During that contact, I did not discern any concerns, agitation or angst on the part of the Gooniyandi peoples about the prospect of Goat Paddock being explored – rather I left with the impression that the locals were keen for there to be exploration in the area and, more particularly, they were keenly interested in the refurbishment and establishment of various tracks by the explorer to and variously through the area in question.

31. I have been very keen for the Joint Venture to strike up a one on one dialogue and ongoing rapport with Gooniyandi but I have been advised by Sarah Yu and Peter Thomas that protocol requires all dealings at this time to be through the KLC as representatives for Gooniyandi.

Likelihood of direct interference

32. The first programme will be to drill the Hole on the Granted Tenement (not the ELA). That programme will take about 4 weeks including getting the rig to site and preparing access and attending to other activities related to the drilling if the Hole.

33. If the Hole is an exploration success then the likely mode in which the Joint Venture would further explore Goat Paddock would be to mount an annual campaign spanning no more than a few weeks before the onset of the wet. Exploration activity on the Tenements will, therefore, most likely be infrequent (once a year) and of short duration (not more than 6 weeks). This is all speculative but reflects my experience. Actual events will be dependant on numerous variables, especially results of successive exploration programmes.

34. Even with the constraints of the wet season and in the unlikely event the local community might want to be in an area at the same time as the Joint Venturers, given my experience, it is inconceivable to me that the timing of any exploration endeavour could not be adjusted to ensure there is no on ground presence by the Joint Venturers at times when the local community indicate they wish to be in the area in accordance with their tradition and custom.

35. In the absence of assistance being forthcoming from Native Title Party, Grantee Party intends to take advice from an appropriately experienced anthropologist in relation to the requisite measures to be adopted to seek to minimise the risk of inadvertently interfering with the interests and sensitivities of Native Title Party.

My Background

36. I have a Bachelor of Science degree (Hons) with my major being in geology. Since graduating, some 40 years ago, from the University of Western Australia I have been a prospecting geologist and businessman.

37. Early in my prospecting career I focussed on the Hamersley Iron Province on behalf DFD Rhodes Pty Ltd and was involved in the discovery of:

    (a) the Rhodes Ridge Group and West Angelas iron ore deposits now owned by Rio Tinto; and

(b) the Mc Ames iron ore deposit now owned by BHP Iron.

38. Late in the 1970's I, together with Peter Ingram, formed Metana Minerals NL and it was a leading Western Australian gold producer before I left Metana early in the 1990's when I became the driving force behind the establishment of Kimberley Diamond Company NL (**KDC**) now Australia's second commercial diamond producer and the fifth largest producer of diamonds in the world. I maintain an active involvement with KDC as the technical director of that company.

39. I also serve on the board of listed ASX companies Herald Resources NL (a company which has produced gold in Western Australia over an extended period and currently is developing an operation in Indonesia) and Sandfire Resources NL (with projects in Western Australia and the Northern Territory).

40. I have been actively involved in a very wide range of exploration and mining activities over the last 40 years. I am very familiar with the impact that various exploration activities can have on the land and the extent to which rehabilitation is effective to restore land to its pre disturbed condition. Rehabilitation efforts in the Kimberly tend to be aided by the significant wet that typically occurs annually and the results of modern rehabilitation of drilling sites in the Kimberly are typically so good that evidence of the incursions made thereby is generally obliterated within a season or two.

41. I have been actively involved with many (no fewer than 4 gold and diamond) operating mines in my capacity as a director of companies – my involvement has extended from the prospecting phase through exploration, feasibility study, development commissioning and operation of mines.

42. For the last 13 years I have lived principally in Broome in the Kimberley of Western Australia.

43. At all times during my 40 years as a prospecting geologist, and more particularly lately since I have lived in Broome, I have had regular contact with the Aboriginal community.

44. I have always spent a huge amount of time in the bush (I still do) and have a good on ground knowledge of vast tracts of outback Western Australia. I love the bush and spending a great deal of my time prospecting out in the bush.

45. Perhaps the best example of my association with the Aboriginals, in the context of a socially responsible association, is through my personal involvement, on behalf of Maxima Pearling Company Pty Ltd (ACN 009 251 441) (of which I am a director and major shareholder) with the Yalwn community at Cone Bay in the West Kimberley.

46. Maxima has a close working relationship with the Yalwn community. That relationship spans some 15 years and includes Maxima (as part of its pearling operations at Cone Bay):

(a) employing and training some of the Yalwn community;

(b) providing emergency services and delivering community benefits (in various forms) to the Yalwn community.

47. The relationship has been positive for the Yalwn community and I am pleased to say that the Yalwn community welcomes the presence of Maxima at Cone Bay.

48. I have never had any conflict with aboriginal groups and I have always, both personally and via my involvement with various entities, been able to work closely and harmoniously with aboriginal communities impacted by the actual or proposed operations in which I have been involved.

Aboriginal Heritage Act 1972 (WA)

49. I believe I have a good hands on working knowledge of the requirements and provisions of the Heritage Act by reason of my background. Faustus is, and I am, favourably disposed to observing and fulfilling the obligations arising in terms of the Heritage Act as fully as possible. We are sympathetic to and supportive of the objectives of the Heritage Act.

50. In my experience, it is unusual for it to be necessary to disturb Aboriginal sites although it is probably done from time to time when no-one, not even Aboriginals, know about them.

51. In my experience, when sites of significance or interest to Aboriginal persons are known, everything has been done by any explorer or miner in which I have an interest to avoid and protect those sites. I have only ever been involved in one circumstance where an Aboriginal site has been knowingly disturbed. In that case an artefact scatter was, pursuant to leave granted in accordance with the requirements of the Heritage Act, disturbed by KDC during the course of its mining activities at Ellendale.

52. As part of my network, it is my practice to cause entities in which I have a controlling interest to engage Peter and Sarah Yu to manage and advise in relation to Aboriginal issues. They were engaged, either by Faustus or the Joint Venture, to assist the Joint Venture develop and manage the relationship with Gooniyandi; Sarah Yu took the lead role.

53. In due course, Sarah Yu told me that a heritage protocol agreement (**HPA**) had been put forward by the KLC (on behalf of Gooniyandi) and that the heritage agreement should be executed. I indicated to her, in accordance with my usual practice, that she should just attend to that matter.

54. R&I, as manager of the Joint Venture, instructed Smyth & Thomas to review the HPA.

55. I repeatedly asked R&I why the HPA hadn't just been signed because I just wanted to get on and drill the Hole in the belief that in all probability the results would determine that the Joint Venture had no further interest in and would walk away from the project.

56. A considerable time later, after I had become increasingly irritated by the delay, it was explained to me by Peter Thomas of Smyth & Thomas and I understood and was convinced for the first time that if the Joint Venturers executed the HPA, Gooniyandi would have the power to veto (**Power of Veto**) the Joint Venture accessing any part of Goat Paddock.

57. This understanding was entirely inconsistent with the repeated assurances which Sarah Yu had given me about the effect of the HPA and, in particular, that the Gooniyandi were not asserting an exclusive right of possession.

58. It took me a long time to grasp that the HPA sought to confer the Power of Veto on Gooniyandi – because it seemed to me that to seek such a power was such an absurd proposition that it must be wrong. It seemed to me that the whole spirit of positive relationship between the explorers and black fellas would be ended for all time if the proposition was correct. That is why it took me so long to come to understand and accept that indeed the HPA, if signed, would expose the Joint Venturers to the risk of them being denied access to the ground without any recourse on the part of the Joint Venturers to the courts or otherwise.

59. As soon as I came to understand the Power of Veto issue, I immediately concluded that it would be pointless for the Joint Venture to go and drill the Hole (even though it was legally entitled to do so given that the Hole was to be on the Granted Tenement rather than the ELA) if, in the event of a discovery being made, the Joint Venture was exposed to the threat of being denied access for other purposes at some indeterminate time.

60. The HPA provided for the concept of programme surveys or programme clearances. That is, before every programme the TOs must be involved in a survey of the area to be affected by the programme. A report is prepared following the survey and the programme is either authorised so it can proceed or not so that the programme cannot be undertaken. The fact that a particular programme has been authorised does not mean that a future programme affecting the same area will be authorised.

61. The Joint Venture would much prefer the concept of area surveys or area clearances. That is, designated areas are surveyed by the TOs at the request of the explorer and a report is prepared disclosing any sites which the explorer needs to be aware of and which sites need to be avoided and whether for some or all purposes.

62. From an explorer's perspective, the fundamental difference between a programme survey and an area survey approach is that in the case of the:

(a) former, the explorer is always exposed to the threat that some activity in the future (and without prior warning) may be prohibited even though much prior activity has been permitted in the same area;

(b) later, the explorer can determine at an early stage what potential there is for sites to impede or block future works on the part of the explorer and in that context can make a commercial decision before spending potentially vast sums of money whether to walk away or not.

63. Had the HPA provided for area surveys rather than programme surveys then the Power of Veto (subject to the final terms thereof) would be acceptable.

64. However, the HPA provides for programme clearances only which means that even though one programme is authorised a subsequent programme in respect of the same area may not be.

65. None of my entities nor I have ever been charged with breaching any State or Commonwealth heritage legislation.'

[27] *Affidavit of Campbell Robert Algie, sworn 8 November 2006*

'I, **CAMPBELL ROBERT ALGIE,** of 15 Matthews Road, Anula in the Northern Territory, Contract Field Services Provider, being duly sworn, make oath and say as follows.

1. I operate a business providing geological and related field services to mining companies and others on a contract basis.

Background

2. During 2005 I was engaged by Faustus Nominees Pty Ltd (**Faustus**) and Namakwa Diamond Company NL (together referred to as **Grantee Party** in this affidavit) to provide services relating to proposed activities in an area the subject of a granted tenement, namely, E80/3153, (**Existing Tenement**) abutting the area the subject of the application (**ELA**) for exploration licence E80/3266, to which these proceedings relate.

3. Part of the area the subject of the Existing Tenement and the ELA is known as 'Goat Paddock', and, I believe, is encompassed by the area the subject of the native title claim made by Native Title Party.

4. Grantee Party proposes to explore Goat Paddock for kimberlite pipes which may contain diamonds.

Prior Contact with Native Title Party

5. I have seen a copy of a document entitled 'Heritage Notice' sent by the Grantee Party to the Native Title Party and their solicitors. Annexed to this affidavit (and marked with the letters 'CRA-1') is a copy of the Heritage Notice. The Heritage Notice sets out the work currently proposed to be carried out on the Existing Tenement by the Grantee Party, as well as the exploration and pastoral history for the Goat Paddock area.

6. During July 2005, I made telephone contact with Mr Norman Cox who was living at the Louisa Downs Station. I was given Mr Cox's name by Mr Graeme Hutton, a director of Faustus, as a person who would be able to assist me to obtain permission to access the tenements. I told Mr Cox that I wished to meet with him as I was seeking permission to visit Goat Paddock to carry out some ground magnetic survey work for the Grantee Party. He gave me permission over the phone, but I asked if I could come and see him to discuss it anyway.

7. During August 2005 I visited the Louisa Downs Station to meet with Mr Cox. At that time I recall speaking to another elder in an informal manner, but I do not recall his name. I do recall that I explained to him that I was there to speak to Mr Cox as I wished to go to Goat Paddock. He told me about the fish and waterholes in the area I proposed to visit and told me that it was "nice country". He did not give me any indication that I should not be visiting any part of the area (he was smiling and happy).

8. I met with Mr Cox and again explained to him that I was seeking access to Goat Paddock to carry out ground magnetic survey work for the Grantee Party. I explained that this work involved minimal ground disturbance and was to assist the Grantee Party in determining if further exploration work in the area was warranted. I explained to Mr Cox what I would be doing, that I would be at Goat Paddock for a number of weeks and I explained that I wanted to speak to the right

people to get the permission of the traditional owners of the land for my work. Mr Cox seemed familiar with the work that I was to do.

9. Mr Cox said words that left me with the clear impression that I was speaking to the right person, that he had authority to speak for the traditional owners of the area that I wanted to visit and that it was OK for me to visit Goat Paddock and carry out my work.

10. Mr Cox did not give me any intimation that I should avoid any areas or that I had to speak to any other persons prior to going to Goat Paddock.

11. The meeting was reasonably brief, with Mr Cox not raising any queries or objections.

12. I also spoke to the pastoralist at Louisa Downs Station prior to going to Goat Paddock. He told me that they occasionally mustered cattle in that area.

Observations whilst at Goat Paddock

13. My first visit to Goat Paddock was sometime in May 2005 when I visited by helicopter for a period of about 2 hours to have a look around.

14. As a result of my meeting with Mr Cox, I travelled to Goat Paddock in August 2005 with one assistant. I travelled partly by vehicle and then by foot due to the rugged nature of the terrain. I recall that the existing station tracks were suitable for vehicles but that access to the proposed drill site area was not possible by vehicle, and I had to travel by foot. Overall I spent 3 weeks at Goat Paddock carrying out the ground magnetic survey. I camped under the hill to the north east of the proposed drill hole location. I saw no one else at Goat Paddock and ELA.

15. Whilst at Goat Paddock I noticed signs of ground disturbance (Star pickets, wire, empty drum) near the spring referred to in paragraph 55 of Mr Dawson's affidavit that appeared to be due to the actions of cattle. The spring is a source of fresh water and shade for cattle.

16. I also noticed the remnants of tracks to the sites of the 2 holes drilled by Utah Development Company Ltd (**Utah**) years before, as well as core sample fragments, core trays and drill collar, corrugated iron, star pickets and drill collars lying around those sites.

17. I did not see any signs of recent human activity on Goat Paddock. To my knowledge no community lives at Goat Paddock, with the nearest community being at or near the Louisa Downs Station.

18. Prior to my reading of the affidavits of Mr Dawson and Street, I was not aware of the presence of any areas of importance to aboriginal people at Goat Paddock. From reading the affidavits I can work out the location of the spring and waterhole referred to in paragraphs 40 and 55 of Mr Dawson's affidavit. Many of the other areas referred to in the affidavits appear to be outside the area the subject of the ELA. I am unable to precisely locate most of the areas by the descriptions given in the affidavits.

19. It seems to me that the best way to identify areas said to be aboriginal sites that cannot be disturbed would be by the Native Title Party either walking the area with representatives of the Grantee Party or else marking the areas on a suitable map. I have been informed by Mr Peter Thomas and verily believe that the Grantee Party has been trying to negotiate some form of agreement with the Native Title Party to achieve this result.'

[28] *Affidavit of Miles Alistair Kennedy, sworn 13 November 2006*

'I, **MILES ALISTAIR KENNEDY,** of 9 Conon Road, Applecross in the state of Western Australia, Company Director and Solicitor, being duly sworn, make oath and say as follows.

Basis for this affidavit

1. I swear this affidavit in support of Grantee Party's contention that it is appropriate to apply the expedited procedure objected (**Objection**) to in these proceedings (these **Proceedings**) to the subject future act, namely, the grant of the application (**ELA**) for exploration licence No. E80/3266.

2. On 7 September 2006 I was appointed, and I remain, a director and the chairman of diamond explorer Resource & Investment Company NL (ACN 085 806 284) (**R&I**). I have had a significant relevant interest (in terms of the Corporations Act) in R&I at all times since it listed on ASX in 2001 – it was then called Namakwa Diamond Company NL.

3. R&I is party to a joint venture (**Joint Venture**) with Faustus Nominees Pty Ltd (ACN 008 874 315) (**Faustus**). R&I is the manager of the Joint Venture. The target mineral of the Joint Venture is diamonds. Herein R&I and Faustus jointly referred to as the **Joint Venturers**.

4. One of the projects the subject of the Joint Venture, known as **Goat Paddock,** is covered by:

    a. exploration licence (the **Granted Tenement**) No. E80/3153 (which I am advised by R&I's tenement manager, Brenton Parry of Western Tenement Services was granted to Faustus on 17 December 2003); and

    b. ELA;

    (herein the Granted Tenement and the ELA being jointly referred to as the **Tenements**).

5. R&I has the right to earn various interests in the Tenements pursuant to the terms of the Joint Venture agreement by incurring certain expenditures as follows:

    a. during first year of the term of the joint venture R&I had the right to earn a 20% interest by expending $250,000;

    b. during second year of the term of the Joint Venture R&I had the right to earn a further 20% by expending $350,000;

    c. during third year of the term of the Joint Venture R&I had the right to earn a further 20% interest by expending a further $500,000;

    d. thereafter R&I had the right to earn a further 20% by paying a further $1,500,000;

    with the Joint Venture interests then being Faustus 20% and R&I 80% and Faustus being entitled to convert its free carried 20% interest into a gross overriding royalty in which event R&I will be deemed to have acquired all of Faustus' right title and interest in the Tenements.

6. Goat Paddock is a diamond project and although R&I is the manager of the Joint Venture, one of the directors of Faustus, Graeme Hutton (**Hutton**), is the driving geotechnical mind behind the Goat Paddock project. The Joint Venture will likely at all times be guided by him in relation to the general course of exploration at Goat paddock.

The real issue

7. Generally speaking, unless otherwise indicated, references to the conduct or position adopted by Gooniyandi are references reflecting the acts or advice of KLC which has declared it acts in a representative capacity for, and on instruction from, Gooniyandi.

8. Native Title Party (or **Gooniyandi** or Gooniyandi mob or people), through the Kimberley Land Council (**KLC**), has persisted with the Objection because Grantee has refused to enter into an agreement (the **HPA**) conferring upon Gooniyandi a continuing non reviewable contractual power to veto access by Grantee to all or part of the area the subject of the ELA (and any other tenement in which the Grantee has or acquires an interest which affect Gooniyandi land, including the Granted Tenement). For ease of reference I refer to this proposed power as the "**power of veto**".

9. The Joint Venturers have no objection whatsoever to:

    a. (and indeed support) the protection of sites of interest to Aboriginals; or

    b. agreeing not to go to certain areas provided they know up front what the consequences are of so agreeing.

10. However, from a commercial perspective, the Joint Venturers had no idea as to when, how, how often, in respect of what areas or for what real motivation the power of veto might be exercised.

11. The Joint Venturers did (and do) not want to be exposed to a situation where they may spend millions of dollars proving up an economic deposit of diamonds only to have the power of veto

exercised thereby frustrating their endeavours to mine the same especially where, consistent with the terms of the proposed HPA, it might well be the case that Gooniyandi either:

a. already know that there are certain areas on which they will never permit certain activities (recognising that they may be prepared to permit certain "non-intrusive" activities but not more "intrusive" activities – for instance, they may be prepared to permit drilling but not mining of a certain area);

b. become aware of a site during the course of a survey pursuant to the HPA but fail to indicate that whilst that site is not an impediment to the conduct of certain exploration activities it will be an impediment to other activities;

bearing in mind that the survey regime insisted upon by KLC in the HPA was to require a survey before every programme to determine whether Gooniyandi will permit the conduct of the programme rather than to survey areas to disclose, once and for all purposes, sites of significance.

12. The likelihood of the power of veto being exercised in a manner which jeopardises the very basis for the joint Venturers' commercial interest in the Tenements could not be meaningfully assessed by the Joint Venturers at the time the requirement for that power became a deal breaker because neither KLC nor Gooniyandi had disclosed or given any indication to the Joint Venturers as to:

a. Gooniyandi's knowledge of sites and areas about which they had concerns;

b. Gooniyandi's present contention that Goat Paddock is a "site rich" area;

yet KLC insisted that areas to be impacted by any programme of Joint Ventures must be surveyed for sites etc prior to the commencement of the programme even though the same area may have previously been the subject of such a survey.

13. Each of the Joint Venturers is concerned that, had particulars of the sites disclosed in the **Affidavits** (of Messrs Dawson and Street filed in these Proceedings) been disclosed to them at an early stage and had the Joint Venturers been given the opportunity to consult fully and directly with the persons obliged to protect and with authority to speak for the country in question in accordance with relevant aboriginal law, tradition and custom (rather than being confined to dealing with KLC), the potential for the power of veto to present a real commercial impediment to the aspirations of the Joint Venturers could more likely have been properly assessed and either:

a. the desire of Gooniyandi for that power could have been accommodated on acceptable terms; or

b. the Joint Ventures could have determined that its aspirations and the manner in which the power of veto was likely to be exercise were irreconcilable and accordingly the Joint Venturers could have withdrawn their interest in the Tenements.

Knowledge of sites

14. I refer to paragraph 19 of the Contentions filed by Native Title Party where it is stated: "*The proposed tenement is located in an area which is site rich, and none of the sites are listed on the Department of Indigenous Affairs' site register*".

15. It is my understanding that no sites are reflected (as existing in the area of the ELA) in the register (the **Register**) maintained by the Department of Indigenous Affairs pursuant to the Heritage Act.

16. Each of the Joint Venturers is well aware that there are many sites protected by the Heritage Act which are not recorded in the Register and that this is the case not only because many such sites are not known to anyone but because, despite the terms of s.15 of the Heritage Act, traditional owners often do not like to disclose details of sites of significance to them.

17. Each of the Joint Venturers recognises that the best way to avoid unintentionally infringing the provisions of the Heritage Act is to obtain the assistance of traditional owners to endeavour to identify sites protected by that Act; but even with the assistance of traditional owners it is possible that relevant sites might not be identified.

18. Gooniyandi (represented by Kimberley Land Council - **KLC**) and the Joint Venturers sought to agree on the terms of the HPA to deal with heritage and cultural matters.

19. From the perspective of the Joint Venturers, the objects of the HPA were to:

    a. ensure that the provisions of the Heritage Act were not unintentionally infringed;

    b. establish a platform for a sound working and co-operative relationship with the Gooniyandi mob;

    c. establish a protocol to be followed in relation to protecting the interests of the Gooniyandi mob in their land to the extent impacted actually or potentially by the Tenements or the activities of the holder thereof from time to time.

20. The protracted and often concerted negotiations in relation to the terms of the HPA were abandoned for the reason articulated in the letter from KLC dated 27 June 2006 a copy of which is marked **MAK-1** and attached hereto. Neither of the Joint Venturers is willing to confer a contractual, non reviewable right upon the Gooniyandi mob to veto the right of the holder of the Tenements from time to time to access the land the subject thereof when the power of access is a fundamental right conferred by tenements granted pursuant to the Mining Act 1978 (WA) subject to certain statutory limitations, including the Heritage Act.

21. Insofar as I am aware, following making enquiries in that regard of each of Sarah Yu (anthropologist engaged by the Joint Venture to assist in negotiations and relationship building with the Gooniyandi mob) and Peter Thomas of Smyth & Thomas, solicitor acting for the Joint Venture in the course of some of the HPA negotiations, Gooniyandi mob did not volunteer the nature or location of any specific sites of concern to them in the context of the tenement application the subject of these Proceedings.

22. Recently, and after the negotiations in respect of the HPA fell away, the Affidavits were served on Faustus. The Affidavits disclose details of various sites of interest to Gooniyandi. Unfortunately, the Affidavits do not provide co-ordinates or plot on any map the location of any of those sites. I tried, with limited success, to identify, by reference to the Map and the Affidavits separately, just where the sites of particular significance alluded to in the Affidavits are variously situated.

23. I now refer to the affidavit of Matt Dawson (and the Map attached thereto which were) served on the Joint Venturer's solicitors by email:

    a. which defines the expression of Tenement Area at paragraph 7;

    b. at paragraph 45 he says there are places within the Tenement Area and some places just outside it which are very important to the Gooniyandi mob;

    c. at paragraph 16 reference is made to "Goat Paddock" but it is unclear to me what area is thereby being referred to either in the context of that paragraph or in the context of the affidavit as a whole;

    d. wherein reference is made to numerous sites;

    e. I endeavoured to ascertain from the descriptions there appearing where on the Map each of those sites is but in the absence of any sites being marked on the Map and in the absence of any co-ordinates being provided and in the context of the lack of clarity about the way in which Dawson uses the expression Goat Paddock, I largely failed in my endeavour. However, whilst I was able to identify the location of No 7 Yard referred to in paragraph 47 and the points marked UTAH 1 and UTAH 2 on the Map, I have no confidence that Dawson's affidavit delineated to me any site within the area of interest with sufficient precision to enable the Joint Venturers to ensure they could avoid them or, indeed, the extent to which the sites referred to might be relied upon by Gooniyandi in the exercise of the power of veto.

24. I now refer to the affidavit of Mervyn Street (and the Map attached thereto which were) served on the Joint Venturer's solicitors by email):

a. which defines the expression of Tenement Area at paragraph 8;

b. I have been able to identify the location of the spring referred to therein as "Jilgara" on the Map as being at one of two possible points and I suspect that it is more likely from the description to be the potential water source numbered "4" than the water source numbered "1";

c. but otherwise I have had the same difficulty trying to pin point the location of the sites of particular significance to Mr Street as I had in relation to identifying sites of particular significance of Mr Dawson.

25. Despite my inability to pinpoint the various sites referred to in the Affidavits (even following seeking assistance of the Joint Venturers' contract cartographer, Ernie Schmidt), I get a clear sense that Mr Street and Mr Dawson and their people do have a strong connection with the area the subject of the Tenements. What is not clear to me is the extent to which Gooniyandi:

a. have an interest in the area of interest to the Joint Venture (being the area shown cross-hatched on the Map) other than somewhere in the vicinity of or behind the points marked UTAH 1 and UTAH 2 – even then I could not tell whether that area of interest was in the cross-hatched area or just beyond it and if beyond it whether to the north-west, south-west or north-east;

b. would seek to protect those sites through the exercise of the power of veto or in respect of which activities that power might be exercised.

26. I and each of the Joint Venturers would welcome the opportunity to consult personally with the Gooniyandi mob in relation to their concerns and as to the manner, if any, in which their concerns can be accommodated so that the parties can co-exist in a harmonious environment. I believe, based on my experience in extensive dealings with Bunuba peoples, that in face to face meetings with the traditional owners with responsibility for the Land in accordance with Aboriginal tradition, custom and law that:

a. the terms of an HPA could be reached;

b. the Joint Venturers could in all probability easily accommodate their real concerns;

all on terms which will deliver some real benefit to the Gooniyandi peoples rather than money being consumed in legal proceedings. Of course it would be necessary for the traditional owners to take appropriately qualified advice with respect to the legal aspects of any agreement

27. The Joint Venturers would like to know, before they spend potentially large sums of money exploring the Tenements, the extent to which the interests of the Gooniyandi mob in the area cross-hatched on the Map will or potentially may impede possible exploration and mining operations. The Joint Venturers would strain to respect the wishes of the Gooniyandi mob in this regard and don't want to proceed with a potentially expensive exploration endeavour in circumstances where Gooniyandi mob already know that they will exercise the power to veto access if it is conferred upon them.

Planned exploration

28. The Joint Venture currently has only planned one specific exploration programme for Goat Paddock. That planned programme is to drill a single diamond hole (the **Hole**) on the Granted Tenement (not the ELA which is the subject of the Proceedings) at the location more specifically delineated in the materials attached hereto and marked **MAK-2**.

29. I am informed by my secretary (and the secretary of R&I), Jean Mathie, that for and on behalf of the Joint Venture she caused the original of those materials (noting that the copy map attached to the materials referred to in the preceding paragraph is a non-scale photocopy only of the originals thereof) together with originals of the map (being the map attached to the Affidavits) (collectively the original materials being referred to as the **Invitation)** to be served on the Gooniyandi People by Australia Post by placing the materials comprising the Invitation in a duly stamped envelope addressed to Gooniyandi People, Future Acts Officer, Kimberley Land Council, PO Box 1725,

Broome WA 6725 and placing the same in an Australia Post mail receptacle on Rheola Street, West Perth on 13 July 2006.

30. The object of making the Invitation was to inform Gooniyandi of the proposed programme to drill the Hole and to extend to Gooniyandi the opportunity to participate in a survey of the area to be impacted with a view to identifying sites of interest to Gooniyandi and/or to which the provisions of the Heritage Act apply.

31. The Invitation was made broadly on the terms contemplated by the draft HPA as then under negotiation between the Joint Venturers and Gooniyandi save and except that the Joint Venturers were not prepared to accede to the demands of Gooniyandi (through KLC) that the power of veto apply.

32. The Invitation was made even though there was no obligation upon the Joint Venturers to do so (as the Hole was to be drilled on the Granted Tenement not the ELA). The Invitation was rejected.

33. Even though the Invitation pertained to the proposed conduct of work on the Granted Tenement (as distinct from the ELA) such that the Joint Venturers were and are at liberty to go and undertake the work at any time subject to logistical constraints including the provisions of the Heritage Act, they have not done so:

    a. out of deference to Gooniyandi; and

    b. given, subject to the observations in the following paragraph, Gooniyandi have not confirmed to the Joint Venturers that the relevant area is free of sites and that such programme may be undertaken without causing offence to Gooniyandi.

34. This restraint has been exercised in the face of:

    a. title to the Granted Tenement being jeopardised by the failure of sufficient expenditure being incurred to satisfy the prescribed expenditure conditions applicable to that tenement – the drilling of the Hole would of incurred sufficient expenditure to meet that condition;

    b. the Joint Venture having received unequivocal legal advice that the failure or refusal of Gooniyandi to participate in a survey of the relevant area is, of itself, no bar to the undertaking of the programme and that as the Granted Tenement is granted the Joint Venturers could lawfully drill the Hole provided they took reasonable measures to observe their obligations under the Aboriginal Heritage Act 1972 (WA) (**Heritage Act**).

Heritage Act and Consultation

35. I am aware of the provisions of and obligations imposed upon the Joint Venture by the Heritage Act because of my long association with the exploration and mining industry in Western Australia and, in particular, by force of:

    a. my service as a director of numerous listed exploration companies dating back to 1983 and including:

        i. being the founding Executive Chairman of Macraes Mining Company (now known as Oceana Gold) in New Zealand in 1988 and taking it from a grass roots gold exploration company to production. It remains New Zealand's biggest gold company and has produced over 2 million ounces of gold since 1990;

        ii. being the founder of Kimberley Diamond Company (**KDC**) in 1993 and at all times being an executive of KDC (I have been executive chairman of KDC since about 1995) - after 9 years of exploration, KDC commenced diamond production on the Ellendale Diamond Field, West Kimberley region of Western Australia in 2002 - by 2007, KDC will be treating and processing 7.7 million tonnes of ore a year, producing around 600,000 carats

of high value diamonds - KDC is the world's fifth largest diamond producer with its operations (the **Operations**) at Ellendale in the West Kimberley;

iii. consolidating, in August 2004, the ownership of tenements in the Ellendale Field from 7 different holders to the single ownership of Blina Diamonds NL and being the non-executive Chairman of Blina which operates 3 diamond recovery plants and is expected to come into full commercial production by 2007;

iv. being the current non-executive Chairman of Marine Produce Australia (which is nearing commercial production of black tiger prawns and salt water barramundi fish), R&I 2006 to date; Brunswick NL 1983/1987;

v. being a former director of Churchill Resources NL 1986/1993; The Union Gold Mining Company NL 1991/1993;

36. As executive chairman of KDC, I played a hands on and pivotal role in the development of the working relationship with the Bunuba people in relation to the Operations and the conclusion of various agreements dealing with matters such as:

a. compensation being payable to Bunuba by reason of the Operations;

b. KDC funding the making of a claim by Bunuba for native title over areas of interest to KDC;

c. heritage protection and protocols therefor;

d. the generation of employment opportunities for indigenous peoples either in the Operations or at the expense of KDC.

37. In order to enable certain of the Operations, KDC made an application under s16 of the Heritage Act to carry out a salvage operation of an artefact scatter. This application followed searches and surveys by Bunuba representatives and an anthropologist and was supported Bunuba after extensive consultation between the parties.

38. At times tensions have run high between KDC and Bunuba but KDC continued at all times to negotiate and consult with Bunuba in preference to instituting legal proceedings to enforce its clear legal rights which, on a number of occasions, would have been logistically and expense wise a much easier course to pursue.

39. I have discussed matter of Gooniyandi's interests in the Goat Paddock area with, and as a result know that, each of the directors and those of its employees and regular advisors whose roles might impact in any way thereupon. Each has demonstrated to me him or herself to be very aware that it is imperative for explorers and miners to:

a. work with traditional owners on a good neighbour basis; and

b. be supportive of preserving Aboriginal traditions and respecting Aboriginal cultural sensitivities;

and unequivocally committed to support these objectives.

40. The culture at R&I and of the Joint Venture is such that each of R&I and the Joint Venture:

a. is strongly supportive of Aboriginal interests generally including, without limitation, the objects of the Heritage Act;

b. would prefer never to disturb any site protected by the Heritage Act or any site (regardless of whether it be protected by the Heritage Act) which is of significance to the traditional owners;

c. would only ever bring an application pursuant to the provisions of sections 16 or 18 of the Heritage legislation as an act of last resort and then only after extensive consultation with the traditional owners (or, if the traditional owners refused to be consulted, after seeking to consult with them);

d. would very much like to and, as far as is proper, will continue to seek to, consult directly with Gooniyandi but to date contact with Gooniyandi has been mostly indirect through the KLC in recognition of KLC's representations that it acts for, and contact with, Gooniyandi should be through KLC.

41. None of the companies I have been or am associated with (including R&I) has ever been charges with breaching any State or Commonwealth heritage legislation.'

Preliminary evidentiary issues

[29] Subject to several comments below, I believe that the evidence of all the deponents in this matter is essentially uncontested and I accept the truth and reliability of their evidence. While saying that, there is a considerable amount of evidence which is irrelevant and, particularly in the affidavits of the grantee parties, evidence which could be characterised as speculative. That material relates to the questions of whether sites exist on the area of the tenement in question; whether they have been appropriately identified in the native title party's evidence; and whether the evidence allows the grantee party to precisely identify the location of those sites in order to protect them. There are practical difficulties which will be addressed later in this decision, however, I do not believe these concerns serve to contradict the specific evidence given by the native title deponents to the effect that sites exist within, and adjacent to, the tenement area and that the native title parties conduct significant communal and social activities throughout the area. As indicated earlier, there is a good deal of evidence, particularly in the grantee party's affidavits concerning the tortuous process of negotiations which took place between the native title party and the grantee party over a number of years in relation to an attempt to forge an agreement between the parties which would obviate the necessity of the determination of the objection. That material is not of particular relevance to this determination. There is no obligation on the grantee party, in circumstances where the State has asserted that the expedited procedure applies, to negotiate with the native title party in the context of the objection, and there is certainly no obligation to do so in good faith. There is no merit in the assertion by the grantee party that the failure of the native title party to disclose the existence of, or significance of, any sites on the tenement area during those negotiations demonstrates a lack of good faith and casts doubt on the veracity of the affidavit evidence of the native title party's deponents (see the affidavit of Thomas at [26]; the affidavit of Hutton at [28], [29]; the affidavit of Algie at [12]). There is no obligation, on the native title party, to disclose any of the information that it may present

as evidence in an objection proceeding during the course of any associated negotiation activity.

[30] There is also some evidence in the grantee party's affidavits to the effect that, during the course of their visits to the tenement area, they had not seen any other persons (including Aboriginal persons) or any sign of human activity on the area (see the affidavit of Algie at [10], [14] and [17]) and similarly, the evidence suggests that it is difficult for the grantee party to identify the exact location of sites and whether or not they are located within the tenement area (see the affidavit of Kennedy at [22], [23e] and [24c]). I do not consider any of those assertions as necessarily suggesting that the evidence presented my Mr Dawson and Mr Street in their affidavits is inaccurate or untrue. The difficulties they identify and the absence of evidence of occupation are all compatible with the evidence provided by the native title party and don't contradict one another, in my view. Consequently, I accept all of the evidence put before me and will proceed on that basis.

[31] There is another matter arising from the grantee's contentions that I wish to consider before proceeding to consider the evidence in this matter. Contentions 45–54 of the grantee party argue the proposition that the failure on the part of the native title party or its representatives to place the sites that they identified in their evidence on the Register of Aboriginal Sites, maintained by the Department of Indigenous Affairs, pursuant to the AHA amounts to 'illegal conduct', and consequently, 'the native title party should not be allowed to use its illegal conduct to support its own case for relief' (see grantee contentions at [53]). Contentions of an almost identical stripe had been dealt with previously by the Tribunal. Member Sosso in *Mark Lockyer & Ors/State of Western Australia/Mineralogy Pty Ltd* [2006] NNTTA 133 (5 October 2006), at paragraph 59 made the following observation:

> 'This line of reasoning is unattractive. The Tribunal will make a finding whether an area or site is of particular significance within the meaning of s 237 (b) irrespective of whether that area or site is registered. The tribunal will not, in the normal course, draw any adverse inference from a fact that a site is alleged to be of a particular significance, that it is not registered, recorded or noted on a heritage register. There could be many reasons for this, including an obvious desire of the claim group not to record a particular site or area on a public register lest it be disturbed or destroyed. Indeed, the *Aboriginal Heritage Act* 1972 recognises that there is not a blanket obligation to disclose information about sites of significance. Section 7(1)(b) provides that the Act shall not be "construed" so as to require (a person of Aboriginal descent) to disclose information or otherwise act contrary to any prohibition of the relevant Aboriginal customary law or tradition.'

I agree with the position of Member Sosso and have not countenanced the grantee's contentions on this matter. I hasten to note the content of paragraph 54 of the grantee's contentions which will be discussed further below.

[32] The native title party, in its statement of further contentions, submitted that a significant proportion of the grantee's contentions (and the affidavit evidence founding those contentions) was not relevant to this inquiry and should not be considered by me in making a determination. The native title party specifically referred to contentions with the headings: *Grantee's track record* in [15]–[21]; *Consultation and negotiation between the native title party and the grantee* in [22]–[27]; *Likelihood of interference* [37]–[40] and [42]; *DIA registered sites* in [45]–[54]; and, *Aboriginal communities* [55]–[56]. In one sense, I agree with the proposition and have made reference earlier to the irrelevance of a significant proportion of the affidavit evidence of the grantee party. As I have mentioned earlier, the evidence relating to the course of negotiations conducted in the shadow of objection proceedings, effected in circumstances of good faith or otherwise, are not material or probative of any of the matters that Member Sosso, has pithily described as the 'very short compass' of inquiries of this nature (see *Lockyer* at [48]). The debate about where the responsibility lies for the breakdown in negotiations and the failure to reach agreement as between the grantee party and the native title party are matters which are irrelevant and I have certainly not considered them pertinent, of themselves, to the primary task of identifying social and community activities, sites of particular significance or major disturbance. However, in assessing the likelihood of disturbance or interference with the area or sites, some of this evidence can be relevant and will be assessed and weight attributed to it during the course of an inquiry of this nature. As French J has emphasised in *Smith v Western Australia* (2001) 108 FCR 442 at [452], 'the task is contextual' and the approach to be taken is based on common sense. I believe that in the context of the conduct of the predictive assessment process, and the assessment of whether the presumption of regularity applies, the history of the grantee's behaviour in similar situations, and the undertakings and commitments that the grantee gives, particularly under oath, are of significant importance and I have treated them as such. Indeed, it has often been legitimately argued by native title parties, in other matters, that the past activities and actions of the grantee party go to their credit when considering the issues of the presumption of regularity (see for instance *Maitland Parker & Ors on behalf of the Martu Idja Bunyjma/WA/Derek Noel Ammon* [2006] NNTTA 65 at [55]–[61]). Consequently, the contentions contained in [15]–[21], [22]–[27], [37]–[40] and [42] to the extent that they are relevant to the intended conduct of the grantee in

exercising of his rights under the grant of exploration licence are relevant and will be considered.

[33] I agree with the native title party that the matters relating to the Department of Indigenous Affairs' registered sites, dealt with in [45]–[53] of the contentions, are irrelevant as I have already noted. For the very reasons I have discussed in the last paragraph, however, I believe that [54] of the contentions is of significance and ought to be given proper consideration. I do not understand, and in any event do not agree with the proposition that [55] and [56], in relation to the existence and location of local Aboriginal communities, are not relevant to the inquiry and consequently, I have given consideration to that evidence.

Authorisation of the native title deponents

[34] The Tribunal has held in the past that it is important that a deponent to an affidavit specify whether they are a member of the relevant native title group, the position they hold in the claim group, on what basis they can speak for the country or site and such other information as will allow the Tribunal to ascertain that what is being deposed to is a proper reflection of the traditions of the claim group (*Dora Sharpe and Others on behalf of the Gooniyandi native title claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western* Australia, [2004] NNTTA 31 (7 May 2004), Mr Daniel O'Dea).

[35] In the present matter, as has been seen, affidavits in support of the native title party's submissions have been sworn by Mr Dawson and Mr Street. Neither of these individuals is a registered native title claimant in the sense that they are applicants to the application. However each of the deponents has provided material within the affidavit which goes to establishing their authority to speak on behalf of the applicant group. Both Mr Dawson (at [5] and [8]) and Mr Street (at [5]–[7]) assert that they are senior Gooniyandi people and speak for the country concerned.

[36] In this matter, on the basis of the statements contained in the affidavits, I am satisfied that each of the deponents has the requisite authority to speak on behalf of the claimant group as a whole and properly reflect the traditions and knowledge of the claimant group concerning the area of the proposed licence.

Findings

Community or social activities (s 237(a))

[37] The Tribunal must consider the likelihood of interference "directly with the carrying on of community or social activities of the persons who are holders of native title." Mr Dawson and Mr Street both depose to such activities being carried on by the Gooniyandi people. In reaching my conclusions I have referred not only to the sections of the affidavits clearly designed to specifically address s 237(a) but to the content of the entire affidavit, given that there appears to be material relevant to the various limbs of s 237 scattered throughout the affidavits.

[38] The contentions of the native title party relevant to this limb are as follows:

i. The area the subject of the proposed licence is used by members of the native title party for camping and conducting Law ceremonies, as well as for hunting, fishing, and the collection of traditional foods.

ii. Members of the native title party are concerned with the care of Aboriginal paintings, burial places and sites of significance within the area of the proposed licence.

iii. There is a real chance that the grant of the proposed licence will interfere directly with the carrying on by the native title party of their community or social activities, being a manifestation of their claimed native title rights and interests.

[39] Mr Dawson states in his affidavit that his father was born on Gooniyadi country, 'in this side of Goat Paddock. The traditional name for the soak in Goat Paddock is Jilgara'. I take this to mean that Mr Dawson is deposing to the fact that his father was born at that soak known as Jilgara. That site appears from the evidence to be otherwise identified, as will later become apparent, as 'potential water source number 1' on the map attached to the affidavit of Mr Miles Alexander Kennedy and Mr Street. This site is indisputably within the relevant tenement (see paragraph 16 of Dawson affidavit).

[40] Mr Dawson outlines in paragraphs 22–30 of his affidavit the history of his experiences with his father and his siblings in travelling around the area known as Goat Paddock. It is acknowledged by all parties that Goat Paddock is an area larger than the tenement we are currently discussing and includes all of the granted tenement E80–3153 immediately adjacent, and to the south of the tenement area of E80/3266 the subject of this

application. In paragraphs 31–39, Mr Dawson sets out his and his family's current use and occupation of the area of Goat Paddock, and more particularly the tenement area with which we are concerned. Mr Dawson indicates that they often stop and camp at the old yard marked number 7 and that they do so several times a year, 'maybe once a month' and that he brings his kids and grandkids out there (see [31]). Mr Dawson also indicates that he hunts for bush meat within the tenement area and that the waterhole in the tenement area is the main waterhole for the area (see [33] and [34]). I take the reference to the waterhole in the tenement area to be the site known as Jilgara in paragraph 16 of his affidavit and as 'potential water source number 1' on the map attached to the affidavits of Mr Kennedy and Mr Street.

[41] Mr Dawson deposes to the fact that they catch bush tucker, including bush meat, *jumbio* (goanna), *barlanya* (snake), *guanuddera* (bush turkey), *garnanganyja* (emu) and *wanyjirri* (river kangaroo); (see [35]). Mr Dawson goes on to indicate that not only do they hunt and catch these animals but they also catch fish in the water sources, including *balga* (barramundi) and *bigruj* (cat fish), and bream (see [37] and [39]). He also indicates that they use the river mangrove or *gooroo* to poison the water and catch the fish (see [38]). At paragraph [40], Mr Dawson highlights his particular concern that the grantee, if they were to use the water from the water hole, would effectively endanger the viability and the sustainability of the water hole and mean that the Gooniyandi people would no longer be able to go fishing in the area. He also expresses a concern that the reduction in the levels of water in the soak would have an adverse effect upon the mangroves, possibly causing them to die, as well as on the other fauna, and making it more difficult to hunt and gather bush tucker in the area (see [41]–[42]). I infer that the water hole referred to in these paragraphs is again Jilgara. At [43] and [44], Mr Dawson indicates that in his view, if the grantee comes onto the country with all of the rigmarole of exploration activity, such as trucks and drilling rings, they will scare away the animals, they will make it impossible for him to hunt and camp in the area, and if they were to fence the area, it would be impossible for him to access it. He also indicates that if this were to occur, he would be unable to teach his children hunting and culture, as he is required to do under the law which has been passed down to him by his old people.

[42] Mr Street deposes that he was born on Louisa Downs Station, within which the tenement is located (see [5]). Mr Street deposes that the tenement area is within the Gooniyandi country and that he and his family live at Pullout Springs about 45 kilometres north of the tenement area (see [11] and [12]). In paragraphs 13–18, Mr Street outlines how as a child he travelled and camped on the tenement area with his older relatives and was

taught about the country within the tenement area. At paragraph 18 he makes reference to a specific area around which they camped, which was the spring. Again, I take that to be Jilgara. Indeed, in paragraph [19], Mr Street refers to Jilgara as a potential water source that is identified earlier as 'potential water source number 1'. At paragraphs 20–31, Mr Street appears, without making specific reference to the present, to describe activities which he currently undertakes within an area adjacent to, and perhaps within, the area concerned. He deposes to the catching of perch, little fish *boonda* in a little creek, but also big fish *gooanggi*, and gathering black plum and *maroorra*—a native tree with orange fruit. He talks about how Jilgara is a good place to camp and where there is also a fresh water mangrove—*goorroo*. He also deposes about how they used the area in the dry period for water; how he takes his kids there to spend a couple of days fishing and how they also camped at the junction of the Margaret River and O'Donnell Rivers, which is outside the tenement area. Then in paragraph 28 onwards, he reverts back to talking to the times when his mother and grandmother showed him across the country, including how to catch animals and collect bush tucker. At paragraph 30 he refers to place called *jirloo*, where a little snake lives in a spring on the left side of the Margaret River, known to *kardiya* or *white men* as "Me No Savvy Yard". He says that this place has a story about *gorranda* and that the story talks of how a snake ran through the place, the brolga was frightened and spit water from its beak making a gorge, which is now called *jaagamigiiami* which means *runaway foot*, and indicates that there is painting of a crocodile in the gorge. He deposes that he and his family camped and, camp, at this place. The difficulty with that evidence is that it would appear that that area is outside of the tenement concerned. Indeed, there is no reference to the site in the supplementary affidavit of Mr Steet sworn on 16 November 2006 where he confirms, in relation to other paragraphs, that the sites referred to are within the tenement area. Again, the site referred to in paragraph 31, reference to which is prefaced by the remark 'from there heading back towards the Tenement Area', is also an area which is outside the tenement area concerned. He indicates in that paragraph that that area is the source of a very important story about the two turtles, the crocodile and the bat. In paragraphs 32–36, he tells of his historical association with the Goat Paddock area travelling around with is mother and grandmother and learning stories, camping and hunting on the area. At paragraph 37 he states: 'that place where my mother told me the story is called *jilgara*, *kardiya* (non-aboriginal people) called it Goat Paddock'. This is a curious and confusing statement. In previous references, the suggestion is that Jilgara is a specific place which contains a permanent spring, which is heavily watered and which has been identified as 'potential water source number 1', but in this paragraph Mr Street seems to suggest that the whole of the Goat Paddock area, which we must remember is considerably

larger than the tenement area concerned, is called Jilgara. For the purposes of this determination, it is my view that the evidence presented in the case, by the applicants—notwithstanding paragraph 37 of Mr Street's affidavit—is that a reference to Jilgara is reference to that site of the wooded spring, in particular, and not to the whole of Goat Paddock. In paragraph 43, Mr Street indicates that the country in the tenement area is very special to him and he believes that if the grantee comes on without first talking to them, takes the water, drills holes, damages the bush tucker and scares away the animals, he won't be able to go out to the tenement area anymore and he is concerned that, as consequence of that, he would not be able to pass on the stories that came to him from his grandmother and mother to his children. At paragraph 44, Mr Street again emphasises the importance of the area to him, to his children and as a means of conveying his culture and teaching his culture to his children. He states that he is particularly concerned if the area is to be accessed by the mining company but that he is also concerned about the cattle that 'live in that valley there, people go and muster in that country there. Two things we're worried about'. I take the two things he is worried about to mean the potential exploration activities of the grantee party and the ongoing activities of the pastoralist. I bear in mind that the current pastoral lease is Aboriginal-owned although there is no evidence before me whether the Gooniyandi, or any of the native title applicants, have any interest in the ownership of that pastoral lease. Again in paragraphs 45–47, Mr Street indicates general concern about the impact on the land that the taking of water from Jilgara by the grantee party would have, including the potential to kill the trees, remove the fauna, and make hunting and fishing impossible.

[43] In summary, the evidence of Mr Dawson in relation to the likelihood of interference with social and community activities on the tenement area by the granting of the tenement relates to his use of the area, particularly the area of Jilgara and Number 7 yard by him and his family, approximately once every month, for the proposes of hunting, camping and fishing, the conduct of ceremonies and transmission of cultural knowledge and information. It would also appear that he, like Mr Street, also use the area commonly known a Goat Paddock (outside the relevant tenement area) for similar purposes, particularly at the junction of the Margaret and O'Donnell River, known as *Walu* (see [32]) and other places such as *Black Fella* Creek, Black Fellow Springs and Black Fellow Creek Yards which are approximately 30 kilometres to the north-east of the tenement area. Mr Dawson's particular concerns are that he would be excluded from the area by the exploration activities, that the exploration activities will make continued hunting, fishing and bush tucker gatherings impossible or untenable and that the area may be fenced by the mining company and

consequently, as a cumulative result of these outcomes, he will be unable to transmit his culture to the young people, as he is required to do under traditional law.

[44] Similarly, Mr Street's evidence indicates that he and his family utilise the Goat Paddock area in general , and the tenement area in particular, for the conduct of community and social activities such as hunting, camping, fishing, bush tucker gathering, ceremonial activity and the transmission of cultural and religious knowledge from one generation to next. Mr Street is not as explicit as Mr Dawson as to the extent of his contemporary activities on the country. He does not specify in his affidavit the frequency with which he goes but given his general tenor of his affidavit, I am prepared to infer that the activities he describes are conducted with reasonable frequency during the course of the year. I note in both cases, that at least historically, the area had previously been accessed more frequently in the "holiday time", which was the wet season. Given the focus on fishing, I also infer that it is likely that there is greater access to the area during the wet season than at other times of the year. Again, similarly to Mr Dawson, Mr Street and his family access a number of areas for the purposes of camping, other than areas within the tenement area, in the general Goat Paddock area. He makes specific reference to camping at the junction at the Margaret and O'Donnell Rivers, (*Walu*; see [26]) and also to other areas such as *jirloo, jarrgamigiiami* and *junda* (see [30] and [31]) which although identified as important places where people camped, and where they continue to camp, are adjacent to the tenement area but not within it.

[45] Again, the concerns that Mr Street expresses about the potential impact on community and social activities of the granting of tenement relate to his perceived inability to be able to hunt, fish and gather on the tenement area or to conduct ceremonies or transmit knowledge to his family as a result of being excluded from the area. He is also particularly concerned about the potential effect of mining activity on the water sources, particularly that at Jilgara.

[46] It is notable that this tenement is 93.7 per cent Aboriginal-owned pastoral lease, being Louisa Downs pastoral lease, held by the Louisa Downs Pastoral Aboriginal Corporation. Mr Dawson does not mention the impact of the pastoral activities on the tenement area, or Goat Paddock or Jilgara in particular. On the other hand, at paragraph 44, Mr Street indicates that he is worried about the impact of cattle on 'that valley'. I take the reference to 'that valley', to be the whole Goat Paddock, but in particular the water sources, especially Jilgara.

[47] I now turn to the Government party's submission. As previously indicated, the area covered by the proposed tenement is 93.7 per cent pastoral lease and 6.3 per cent unallocated land. The government party indicates that there are no Aboriginal communities within the

proposed area. It would appear that there are Aboriginal people living at the Louisa Downs Homestead but there is no evidence to indicate exactly where that homestead is in relation to the tenement area or whether the residents are related to the native title party. Also Mr Street indicates that he lives with his family at Pullout Springs which is 45 kilometres north from the tenement area (see [12]) and Mr Dawson indicates that he lives with his family two kilometres out of Yiyilli, where he has a block of land (see [3]). I am unaware where Yiyilli is in relation to the tenement area.

[48] The government party, in its contentions makes reference to s 20(5) of the Mining Act which has certain requirements of any potential explorer in relation to the occupiers of the land, including the pastoral leases. As has been previously indicated in determinations of this sort, the relevant provisions of section 20(5) are not of particular assistance in this context (see Deputy President Sumner in *Walley v Western Australia* at 454–455 and Member Sosso in *Mark Lockyer* at 17).

[49] Further, the State makes reference to s 63 of the Mining Act which imposes general conditions on the grant of the tenement, as well as the special conditions and endorsements which will be attached to the tenement if granted (Annexure A of their contentions).

[50] I now turn to the evidence of the grantee party. This is contained largely in the three affidavits of Mt Hutton, Mr Algie and Mr Kennedy. Before I turn to that evidence, it needs to be reiterated, as is made clear in the grantee party's contentions, that the area of Goat Paddock is significantly larger than the tenement area itself, and the granted tenement to the south. For the purposes of clarity, the tenement area we are currently concerned with is the northern tenement of the map which that been attached to affidavits of Mr Kennedy and Mr Street, being E80/3266. The southern boundary of that tenement forms the northern boundary of the lower or southern tenement which has been granted and which is known as E80/3153. It is that tenement, i.e. the granted tenement, that according to the grantee's contentions and affidavits it is currently intended to drill an exploratory hole. Only after that hole has been drilled and the results have proved satisfactory is it the intention of the grantee party to carry out any exploration activities upon the tenement with which we are currently concerned. It is also clear from the grantee's contentions and affidavit material that a great deal of effort was put in to an attempt to reach agreement in relation to the grant of the relevant tenement. It would appear that substantial agreement was reached but a final agreement was not able to be forged over the issue which is characterised by the parties as "no means no" or "the veto". A great deal of the evidentiary material submitted, particularly

by the grantee, in relation to this negotiation is of no particular relevance to these proceedings. What is of relevance is the intentions of the grantee party in the conduct of its exploration on the area and the manner in which it intends to conduct such activities. In any case, the evidence of the grantee party is that it is seeking to understand an anomalous magnetic feature which is currently identified within the existing granted tenement, they need to drill a single hole within that tenement in order to identify whether there is presence of kimberlite which in its turn would indicate the possible presence of diamonds (see Hutton [5]–[7] and point 2 of the Heritage notice MAK-2 in the affidavit of Kennedy). In the event that the hole does not intersect with kimberlite, it is the grantee's intention not to proceed with further exploration on either the granted tenement or the tenement currently under discussion. If the anomaly is explained by the presence of a kimberlite intersection, it is not entirely clear from the evidence in any of the affidavits exactly what would happen, but I infer that, amongst other things, it would lead to the conduct of exploration including drilling within the hatched area of interest drawn on the map attached to the affidavit of Mr Dawson and Mr Street, which includes land within the granted tenement and the application area.

[51] The grantee party has indicated that 'it is inconceivable that the grantee would seek to fence on any part of the ELA in exercise of its rights upon the grant of the ELA save and except to give effect to the wishes of the Native Title Party to protect the area of interest to Native Title Party' (see paragraph 12 of the Hutton affidavit).

[52] In relation to the question of the water, the grantee indicates that it would not use water in an irresponsible manner (see [13] of the affidavit Hutton). In the Heritage notice MKA-2 attached to the affidavit of Kennedy, there is reference to the water use which was likely to be required in the program which was proposed to be conducted in June 2006 and which was the subject of the invitation (see [21] of Kennedy affidavit). In that document there is a statement to the effect that maximum daily water requirements would be estimated to be less than 8 cubic metres and likely to be much less; there are many permanent water holes in the area and all the water holes that are accessible and are heavily used by station cattle. The document indicates that it is the intention of the grantee to draw water from the permanent spring-fed waterhole in the creek at the camp site (which is 253300 E, 7973450 N). I infer this is 'potential water source number one' on the map and which I take to be Jilgara. The document indicates that Jilgara has an estimated volume of 40 cubic meters and that there is evidence of structures having previously been installed for pumping purposes. The document goes on to suggest that in the event that it is not possible to obtain water there, they have the two alternatives which I take to be the two potential water sources in the

vicinity of the O'Donnell River and Station Bore which are noted on the map as 'potential water sources 2 and 3'. Finally, it is said that if suitable drinking water is not available, then that drinking water can be obtained from a smaller spring-fed waterhole on the northern side of the hill, immediately west to the camp site which I take to be 'potential water source number 4'. In any event, there would appear to be three alternative water source for use in drilling purposes and four alternative water sources for drinking water purposes, two of which are outside the tenement area. Further, in the affidavit of Kennedy, the grantee makes it clear, amongst other things, that they agree to not going to certain areas, provided they know up-front what the consequences are of so agreeing (see [9](a)). Mr Kennedy deposes to the fact that he and the grantee party would welcome the opportunity to consult personally with the native title party in relation to their concerns and would 'attempt to accommodate those concerns in a harmonious environment' (see [26]). At paragraph [27] he deposes to the fact that 'the joint venturers would strain to respect the wishes of the Gooniyandi mob in this regard and don't want to proceed with a potentially expensive exploration endeavour in circumstances where the Gooniyandi mob already know that they will exercise the power to veto access if it is conferred upon them'. Pursuant to s 66(d) of the *Mining Act* (1978) the holder of an exploration licence is authorised, inter alia,

> 'to take and divert, subject to the *Rights in Water and Irrigation Act* 1914, or any act replacing or amending the relevant provisions of that Act, water from any natural spring, lake, pool or stream, situated or flowing through, such land or from any excavation previously made and used for mining purposes and subject to that Act, to sink a well or bore on such land and take water therefrom and to use water so taken for his domestic purposes and for any purpose in connection with exploring for minerals on the land'.

Section 5C of the *Rights in Water and Irrigation Act* 1914, requires that a person may not take water from any water course, or cause or commit any of those things to be done, without a licence, except, inter alia, in circumstance where the right is conferred by another written law (see 5C(1)(c)(iii)). In consequence, the holder of an exploration licence has the right to take water for the purpose of its domestic and exploration needs without a licence under the relevant legislation on the area of land the subject of the tenement. However, it would appear that in relation to potential water source No. 2 and 3, which are off any tenement held, or potentially held, by the grantee, a licence would be required.

[53] The grantee also indicates that if it were to explore on the tenement area, it would be present for not more than six weeks before the onset of the wet, in any particular year. Mr Hutton in his affidavit indicates the following: 'it is inconceivable to me that the timing of any exploration endeavour could not be adjusted to ensure there is no on ground presence by the joint venturers at times when the local community indicate they wish to be in the area in

accordance with their tradition and custom' (see [33] and [34], Hutton affidavit). Again, Mr Hutton deposes in his affidavit to the fact that, in the absence of an agreement with the native title party, it is the intention of the grantee party to take the advice of an appropriately experienced anthropologist 'in relation to the requisite measures to be adopted to seek to minimise the risk of inadvertently interfering with the interests and the sensitivities of the Native Title Party' (see [35], Hutton affidavit). The grantee party, in its contentions at paragraph 17, says '…the Grantee Party …wish to work co-operatively with the traditional owners of the Land, regardless of whether a formal agreement is reached with Native Title Party and regardless of whether Native Title Party is, in the result, determined to be the holder of native title (see Hutton affidavit 31, Kennedy affidavit 16–21, 29–34, 39–40)'. The grantee party repeatedly refers in its affidavit and contentions to the invitation it issued to the native title party through the KLC, in approximately June 2006, for the conduct of the heritage survey on the granted tenement, notwithstanding that they were not required to do so under, either the Native Title Act or the AHA, to the effect that the invitation is evidence of their good faith and determination to ensure that neither the community or social activities nor sites of significance in the area are interfered with inadvertently by the activities of the grantee company in exploring the relevant tenement (see [29]–[32] of the grantee's contentions; [33] of Hutton affidavit). Mr Kennedy deposes at [39]–[40] to the effect that he has consulted with each of the directors of the Joint Venturers and those of its employees who will have a role in the exploration of the area. Each has demonstrated to me that they are aware that it is imperative for explorers and miners to:

> 'a) work with traditional owners on a good neighbour basis; and
>
> b) be supportive of preserving Aboriginal traditions and respecting Aboriginal sensitivities;
>
> and are unequivocally committed to support these objectives'.

[54] Both the grantee party and the native title party make reference to the existence of two existing drill holes, being UTAH1 and UTAH2, as marked on the map attached to the affidavit of Mr Kennedy. These holes were drilled by the UTAH development company in 1972, testing for diamond bearing kimberlite pipe. Today, there are still core sample fragments, core trays, corrugated iron, star pickets and drill collars, lying around that site (see Algie affidavit, [16]). Mr Dawson, in his affidavit at paragraph 47 indicates that there is a big story at the area which is near the place marked as "UTAH 1" and "UTAH 2" on the map. Also, in Paragraph 66 of Mr Street's affidavit, he again makes reference to there being a story behind the points marked UTAH 1 & 2 and states that that is an area the grantee intends to

drill. 'Directly behind the points marked "UTAH 1" and "UTAH 2", there is *Joongoorra* there, where they are going to go or drill'. At paragraph 5 of the native title party's contentions, it explicitly assumes that UTAH 1, UTAH 2 and drill hole are the three sites of the grantee's exploration interest. 'It is assumed that these markings indicate the grantee's intentions in relation to the exploration of the tenement area'. At paragraph 23, Mr Hutton deposes to the fact that there is evidence of activity left by UTAH and that is a legacy of the rehabilitation practice at the time. 'Had UTAH rehabilitated the areas impacted by it in accordance with today's standards evidence (sic) its presence would long since have been obliterated'. He commits the grantee to fully rehabilitate any area in accordance with appropriate requirements under law (see [22] of Hutton affidavit). It is apparent that there is a misunderstanding here. It is clear from the affidavit of Mr Hutton (see [7]–[11] and document marked MAK-2 attached to the affidavit of Kennedy) that there is no current intention to drill in the vicinity of UTAH 1 or UTAH 2. At paragraph 2.1 of that document headed 'Drilling', it indicated the current intention of the grantee party is to drill a single hole at location 253700E 7970240N to the depth of approximately 250 metres and a diameter of approx 2–3 inches. The drill hole will be located, as far as possible, at that immediate location as indicated on the map but may vary dependent on 'local geological and terrain considerations'. Subsequent to encouraging results, further drilling will be carried out within the described areas of interest. It is my understanding from the map attached to Mr Kennedy's and Mr Street's affidavit, that the proposed drill hole is identified in the map as 'DRILL HOLE'; the hatched area is the "described" area of interest, and that UTAH 1 and 2 are included merely as a means of identifying where the previous holes were drilled. In the event that the drill results indicate an intersection with kimberlite, it is the intention of the parties to drill further to confirm the results within the described area of interest, i.e. the hatched area, but not necessarily in, or in the vicinity of, UTAH 1 or 2. My understanding of the grantee's evidence is that, if the data they obtained indicated that further drilling is required that they will negotiate with the native title party, pursuant to the terms of a heritage protection agreement, largely in accordance with the one previously under discussion, other than the controversial element, and do their best to avoid—as far as is possible—the drilling of any further hole in any area which is not preferred by the native title party.

[55] For an objection to be upheld in relation to s 237(a) of the Native Title Act, there must be evidence to show there is a likelihood, (in the sense of a real risk) that there would be substantial impact on a community and social activities of the native title party. In accordance with the findings of Sosso in *Silver & Ors v Northern Territory & Ors* (2002) 169

FLR 1, at [48], I accept the position that the community and social activities disclosed by the evidence in this matter are community and social activities which are manifestations of the claimed native title rights and interests of the native title party. I further adopt the discussion in relation to this matter of Sumner DP in *Miriuwung Gajerrong Aboriginal Corporation/Western Australia/Seawood Holdings Pty Ltd* [2006] NNTTA 74 at [32]–[34]. The predictive assessment the Tribunal is required to undertake, must consider whether the grant of the proposed tenement will be likely to result in direct interference with the community and social activities, there must be a real chance of such a risk. Justice French in *Smith* indicated that any interference 'must be substantial in its impact upon the community or social activities. That is to say trivial impacts or impacts which are nor relevant to the carrying out of community or social activities are outside the scope of the kind of interference contemplated by the section'. His Honour further observed at [452]:

> 'The evaluation is contextual. The extent of interference and the proximity of its causal connexion to the future act proposed should not be considered in isolation. In assessing the risk of direct interference generated by the future act, the Tribunal is entitled to have regard to other factors which so affect community or social activities that the impact of the proposed future act is insubstantial…To have regard to the constraints already imposed on the community and social activities of the native title claimants by third parties and external regulation is a legitimate element of the assessment of the extent of the interference flowing from the proposed future act.'

At paragraph 21 of the native title party's contentions (i.e. the first paragraph 21, referring to s 237(a)), the native title party asserts that an act must be likely to interfere with those community and social activities, but:

> 'the expression – "[to] interfere directly with the carrying of the community and social activities" – should be understood according to the plain and ordinary words used. It follows that the mere existence of the Grantee Party on the Tenement, in circumstances where there is no negotiation or consultation between the Native Title Party and the Grantee Party, could be likely to give rise to a direct interference with the carrying on of community and social activities of the Native Title Party, notwithstanding the absence of any direct physical interference'.

The native title party cites Carr in *Ward v Western Australia* (1996) 136 ALR 557 as authority. The government party makes reference in its contentions, at paragraph 15 to the decision of Member Sosso in *Silver v Northern Territory* (2002) 169 FLR 1 at [62], to the effect that the future act must be likely to have a direct physical interface with activities which in turn would impact on the spiritual dimension of those activities, that is, any spiritual dimension must be rooted in those activities.

[56] I have addressed contentions of this nature on previous occasions in relation to matters in the Kimberley. In this instance I refer to what I said in *Delores Cheinmora and*

Ors on behalf of the Ballanagra Native Title Claimants v Western Australia (2005) 196 FLR 250 at paragraph 33:

> 'The native title party contends that community and social activities can have a spiritual dimension, citing in support of this contention Walley at [13]–[21], in which the Deputy President Sumner considered the differing views of Tribunal members in relation to this issue. I have considered this contention in a previous enquiry (Dora Sharp & Ors on behalf of Gooniyandi Native Title Claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western Australia [2004] NNTTA 31 (7 May 2004) at [29]) and I agree with the position of Deputy President Sumner at [14] in Walley, concurring with the views of Sosso in Silver, to the effect that any spiritual dimension to community and social activities must be rooted in those activities'.

The contention of the native title party misconceives the current state of the law in relation to the relevance of the spiritual to the consideration of direct interference with community and social activities.

[57] In my view, the evidence in this case clearly establishes that the native title party carries out intermittent, but nevertheless important, social and community activities of a physical and spiritual nature which may fairly be characterised as community and social activities for the purposes of s 237(a) on the tenement concerned.

[58] The connection they have to the area the subject of the tenement is focused around the area known as Jilgara, the area near the spring also identified on the map as 'potential water source number 1' and the area in the vicinity of the old UTAH development drill holes, known as UTAH 1 and UTAH 2, and also referred to by Mr Street in his affidavit as *Joongoorra* (see [66]).

[59] The next issue I must determine is whether in the circumstances, the activities of the grantee party, under the terms of exploration licence, and in light of the evidence that it has given about its intentions, are likely to directly interfere with those community and social activities. The test to be applied here is the "real risk" test, identified in *Smith* at [23]–[25] and adopted in *Silver* at [92]. As His Honour Justice French observed in *Smith* at [452] "the evaluation is contextual". Consequently, the Tribunal has also held that the existence of prior mining or pastoral activities which have in the past affected, or which currently affect, native title parties' community or social activities, may be taken into account in assessing whether the grant of the exploration tenement is likely to affect those activities (see *Smith* at [26]–[28] and *Walley* at [12]). The great majority of the tenement area is the subject of an Indigenous-controlled pastoral lease and the evidence suggests that that pastoral lease is still actively worked, involving the utilisation of the area by a number of cattle who have an impact on the country, and in particular, on the water sources within the tenement area. There has been

mining activity in the past, mainly in relation to UTAH but nothing of any significance in recent years. Both deponents for the native title party speak in impassioned terms of the need for there to be consultation between the grantee and the native title party and a relationship of mutual respect. Mr Dawson starkly and eloquently articulates his fears in the last three paragraphs of his affidavit which read:

> [66] 'If the Grantee go there, they might make a big fence there, and we can't go in. If people go in there without asking, they are acting out of place. If they take that mineral out of the ground, what we get? What Aboriginal people get?
>
> [67] If they bugger that Dreamtime story; that spring mightn't be lasting if they drill through there.
>
> [68] The mining people are not talking straight to the Traditional Owners and that's not fair. They make enemy of Aboriginal people by destroying the Dreaming.'

If nothing else, this passage makes it clear that there is a level of mutual miscommunication as between the native title party and its representatives, and the grantee party. Everything in the evidence presented to the Tribunal in this matter indicates that the grantee party is prepared to enter into agreements which will provide recognition of the aspirations and sensitivities of the native title party. There appears to have been a disagreement on an issue, no doubt of significance, but, a preparedness nevertheless, by the grantee to enter into dialogue and accept the wishes of the traditional owners and respect their sensitivities and areas of significance, albeit with a view to retaining a capacity to exercise such rights as they may possess under the law and to question such decisions if they lead to an exclusion from an area which is of crucial significance to them as mineral explorers. Nevertheless, it is clear that the statements made by Mr Dawson about the current approach of the grantee in paragraphs 66–68 of his affidavit do not accurately reflect the current intentions or demeanour of the grantee party. It cannot be argued that a failure by a grantee party to accede to all the requirements of a native title party in relation to the control of exploration activities on a proposed tenement area amounts to an increased likelihood of interference.

[60] In light of this evidence, it is my view that it is not likely that the grant of E80/2953 will interfere with the community and social activities of the native title group. The reasons for this are the following:

a) The native title party accesses the area periodically and regularly but not constantly.

b) The grantee party has indicated a willingness to negotiate with the native title party to avoid the conduct of its annual six-weeks of exploration of the area at times when the native title party seeks access in order to conduct those social and community activities.

c) There has been previous exploration activity on the country and there continues to be pastoral activity which has impact on the flora, fauna and water sources in the area.

d) The grantee party has indicated a willingness to enter into agreement which would address most of the concerns of the native title party albeit it is unwilling to accept the conditions related to the "no means no" clause.

e) Finally, many of the concerns raised by the native title party do not appear to be matters that the grantee, on the basis of the various commitments sworn to in evidence by its directors, officers and legal representatives, has an intention to pursue at all, or in any event, without consultation. Notwithstanding that the State intends to grant the tenement without condition other than the standard conditions and endorsements it refers to in its contentions.

[61] Consequently, the first limb of s 237 is not attracted.

Sites of particular significance (s 237(b))

[62] The issue the Tribunal is required to determine in relation to this limb s 237 is whether there is likely to be (in the sense of a real risk of) interference with areas or sites of particular significance, (in the sense of special or more than ordinary significance) to the native title party in accordance with their traditional laws and customs (*Cheinmora v Striker* (1996) 142 ALR 21 at [34]–[35]).

[63] The native title party contends that the tenement area has been shown to be 'site rich' (contention 19) and consequently:

> 'it is incumbent upon the Grantee Party to lead some evidence to provide a basis upon which the NNTT might be assured that interference, intentional or otherwise is not likely, given the practical difficulties with avoiding interference with sites in site rich areas where not all sites may be included on the Department of Indigenous Affairs' site register. In the absence of evidence from the Grantee Party, the presumption will be that the relevant interference is likely' (contention 18).

The native title party contends that the protections afforded under the AHA are insufficient to protect sites or objects of Aboriginal significance; that it is possible for the grantee to interfere with the site of particular significance without breaching the AHA, i.e. 'mere presence in some areas may cause interference' (see contentions 20–26).

[64] The evidence of the native title party in relation to the location and significance of sites of particular significance in the tenement area has proven difficult to fully comprehend. There appear to be some inaccuracies in the original submissions in relation to the affidavit evidence on the location of sites. Nevertheless, as a result of the supplementary affidavits and contentions filed by the native title party, I now feel confident that I am able to identify the location of the sites referred to either as being within the tenement area, passing through it or adjacent to it and, consequently, to assess their particular significance.

[65] The affidavit of Mr Dawson indicates that *Jilgara* is special because there is a Dreamtime story associated with it and that his ancestral snake is in the spring now. He says: 'The snake came from the river and went up to that spring, tread down the waterhole to that spring'. He states that the snake is called *Joongoorra* and that under his law he has to look after it (see [49]). At paragraph 50 he says that when the summer weather is really bad, they can always find water in the spring and they can talk to the snake and the snake can make it rain. He says that they talk to the snake when they visit the area so that they won't disturb it. 'Every time you come out here you have to have water put on your head because of the Dreaming time. That's our culture you know, so the country recognises you'. If you are a stranger, you might get a headache 'because you don't do the right thing' (see [51]). He says that there are other stories about that place at *Jilgara*, one concerning a blue brolga with a wet head that can be seen in the lagoon. That place is called *Moowarra* (see [52]). *Moowarra* appears to be a song line or dreaming track which passes through the tenement area and proceeds on beyond it. Mr Dawson further states that his family camped at a site called *Nyalagi* which is to the south east of Goat Paddock where there is a story about a flying fox, called *Bigermee.* The flying fox was the best dancer and the crocodile was jealous of the flying fox. The flying fox family talked to him and he went back and got his spear and speared the crocodile. That dreaming track appears to move up through the tenement in the direction of the area near the sites of UTAH 1 and UTAH 2 and then on to *Jilgara* (see [46]–[47]). There also appears to be a site which, it is asserted in the supplementary submissions, passes through the tenement area. The site in question is named *Walus* and is referred to in paragraph 53 of Mr Dawson's affidavit. However, what Mr Dawson says in that paragraph does not persuade me that that waterhole, as it's described—which is in the Mueller

Ranges—is associated, in any conclusive way, with the dreaming track that passes through the tenement area. Other sites referred to at paragraph 9 of the original contentions relating to Mr Dawson's evidence, including a *Telingun* at [30], *Walu* at [32], appear to be sites which are clearly outside the tenement area.

[66] The affidavit of Mr Street in relation to sites of particular significance firstly confirms the evidence given by Mr Dawson in relation to *Jilgara*, and further confirms its location within Goat Paddock to the north east side of the tenement area (see [48]). Mr Street in his supplementary affidavit confirms that the site he identifies as *Joongoorra*, in paragraphs [54] and [66], which is the area of the cliff face near and behind UTAH 1 and UTAH 2 as marked on the map attached to Mr Street' s affidavit. Mr Street describes the area as a big wall cliff face, directly behind UTAH 1 or 2, which can easily be seen from across Goat Paddock. He says:

> 'There is a rock hole there that comes from that story of two turtle and the crocodile. That place is where they bring that crocodile, to put him in that place. The two turtles stopped at the wall, one short neck and one long neck: one long neck is *Walarabi* and short neck *doowi.* There is a black thing there, that mark, and that's where in the Dreamtime one turtle dropped that bar, to hear the sound of how deep that water was for the crocodile to live there. The turtle was checking out how deep the water was, to see whether it was deep enough to take a crocodile into the water'.

In the end of the story they all sat down, the two turtles and the goanna with the crocodile. In Goat Paddock when they arrived there were people who lived there and they turned into animals: turtles, crocodile, *Yuwilli* and goanna. He relates how his ancestors turned into animals and that is how they now refer to themselves—how they got their skin names as either turtles, or crocodiles, or goannas (see [54]–[56]).

[67] In his supplementary affidavit, Mr Street also asserts that the site he refers to in paragraph 61 of his affidavit is also a site within the tenement area. In that paragraph, Mr Street refers to another big Dreaming story:

> 'my Story, but part of the *Gooniyandi* stories, also happened right there in that place in Goat's Paddock. In that place, that is where the turtle said to goanna, you must give your head to the crocodile because he is the one that has to live in the water and you'll be on dry land. The crocodile and the goanna swapped over heads then. I'm related to that area by that Dreaming. It is from my mum, passed on from my great grandmother, right back to my great grandmothers and fathers.'

It is not entirely clear to me that this site is one within the tenement area. There is a reference in the second line of paragraph 61 to the effect that it happened 'right there in that place in Goat Paddock', and given that, in the paragraphs 54–60 previously we had been discussing the story related to the *Joongoorra* site, which is located within the tenement area within

Goat Paddock, I am prepared to infer that the area the subject of the story is within the tenement area.

[68] In Mr Street's supplementary affidavit, he seeks to confirm that at paragraph 4 'some of the burial sites referred to in paragraph 51 and 67 of my original affidavit are within the tenement'. The native title party's supplementary contentions are not so equivocal indicating that 'burial sites identified in paragraphs 51 and 67 of his original affidavit' when making reference to particular sites that are located within the tenement area. Paragraph 51 of Mr Street's affidavit reads as follows:

> 'In this place there are burial sites. Both Gija and Gooniyandi people used to live in and around the Tenement Area, all along the rivers. Those old people were shot and poisoned, and killed. There is a massive grave from a long time ago. I can't talk about where those burial sites are. Matt Dawson got family and I've got family here. This area is in Gooniyand*i* country.'

I am simply unable to conclude that the burial sites that Mr Street refers to are located in the tenement area. He makes reference to 'in and around the tenement area', 'all along the rivers' and 'the area in *Gooniyandi* country'. None of that evidence in my view is sufficiently specific, particularly given the lack of detail concerning the site (which in itself is understandable) to convince me that any of the burial sites referred to at paragraph 51 are within the tenement area. Paragraph 61 is, if anything, even less specific. It talks rather in terms of how people would feel if the grantee was able to walk over the funeral place rather than attempting to identify the location of the site and therefore does not add to the evidence in relation to whether or not those sites are within the tenement area and consequently, does not assist.

[69] Mr Street also gives evidence in relation to sites of particular significance or dreaming tracks which pass through the tenement area. He confirms the information provided by Mr Dawson in relation to *Moowarra* identified at paragraph 52 of his affidavit. He also identifies a site known as *Ngoolanarra* in paragraph 31 of his affidavit. He indicates this area originates 'just west of the bottom left of the Tenement Area', which I take to be the south west corner of the tenement area, and indicates that is where the story about the two turtles, the crocodile and the bat originated, which according to the evidence of Mr Dawson travels up to and possibly through the area in the vicinity of the drill holes, UTAH 1 and UTAH 2. Mr Street refers to the danger that strangers may encounter if they go onto the area without the approval of the traditional owners, including that they might go blind (see [65]); get sick and die (see [69]); and that they may get themselves into trouble with the water snake and consequently get very sick if they don't go there with the consent and accompanied by the traditional

owners. Mr Street believes that if the grantee goes into the area without them, they would be very worried about them (see [70]–[71]). Contrary to the assertions in paragraph [29], of the native title party's original contentions, the sites referred to by Mr Street as *ngarri doogidgilari* at [29], *jirloo* at [30]; *jarrgamigiiami* at [30] and *junda* at [31], are not within, but probably adjacent to—although not passing through—the tenement concerned.

[70] The grantee party contends that the sites referred to in the native title party's evidence are not sufficiently described to enable the location of the sites to be determined (see grantee's contentions at [13.2]). Mr Hutton, in his affidavit, expresses the view at [29] that he believes that it is unlikely that there are any sites of significance to the local community within Goat Paddock, except to the north end where there is a spring. The spring he refers to I take to be *Jilgara* or 'potential water source number 1'. Of course, Mr Hutton does not indicate the factual basis upon which his belief is founded. At paragraph 23 of his affidavit, Mr Kennedy indicates that he has had some difficulty in identifying where the sites referred to in Mr Dawson's affidavit might be located and whether indeed, they are located within the tenement area concerned. Similarly, at paragraph [24], he expresses scepticism about his capacity to accurately and precisely identify the location of the sites referred to in Mr Street's affidavit, as being within the tenement area. However, in paragraph 25, he goes on to say: 'Despite my inability to pinpoint the various sites referred to in the Affidavits (even following seeking assistance of the Joint Venturers' contract cartographer, Ernie Schmidt), I get a clear sense that Mr Street and Mr Dawson and their people do have a strong connection with the area the subject of the Tenements'. Mr Kennedy goes on to says that he is not clear as to whether they have an interest in the hatched area of interest (which is grantee's 'described area of interest') or outside that area, and how they would seek to protect those areas.

[71] Having carefully read and analysed the affidavit evidence of Mr Dawson and Mr Street, I am satisfied that there are sites of particular significance to the native title claimants to be found at *Jilgara* which is the spring also identified as 'potential water source 1' and at *Joongoorra* which is the site identified as being in the vicinity of UTAH 1 and UTAH 2. I also accept that the site identified as *Ganinya* close by to *Jilgara* is also a site of particular significance to the Gooniyandi people. I also conclude that the sites *Moowarra* and *Ngoolanarra* are dreaming tracks or song lines which pass through the tenement area and are consequently sites of particular significance within it. At these sites the native title party's members are required to follow a stringent set of practices designed to appease and respect the beings that are immanent in the relevant features of the landscape. The practices and the

narratives which lie at their base indicate a set of behavioural patterns that have a normative foundation. These are also indisputably of great ongoing significance to the native title party.

[72] Although it is unnecessary for me to consider it, there are no registered sites recorded within the area and as the Tribunal has said previously, the AHA protects all Aboriginal sites whether they are on the register or not, and in the event that there are no sites on the register—as it does not purport to be a record of all sites in Western Australia—the Tribunal will consider whether there is enough evidence to support the existence of a relevant site within a particular area.

[73] Now that I have determined that there are sites of particular significance on the tenement area, I need to turn my attention to the issues of the question of the presumption of regularity and the adequacy of the protective regime put in place under the relevant legislation to make any interference with sites of particular significance unlikely. The Government party has relied on various sections of the AHA to contend that the grant of the proposed tenement is unlikely to interfere with areas of sites of particular significance. The regulatory regime based on the AHA has been described on numerous occasions by the Tribunal, most recently in *Maitland Parker* at [31]–[38], [40]–[41]. The Tribunal will give due weight to the protection regime and the presumption of regularity but each case must be assessed on its particular facts. The grantee has addressed the issue of how it would avoid interference with sites in the tenement area in its affidavits and contentions in a comprehensive manner. A good deal of this material has already been referred to in the previous discussions in relation to s 237(a) of the Act, in [47]–[50] above. That evidence needs to be borne in mind when considering the additional evidence which I have discussed in this section.

[74] At [54] of the grantee's contentions, the grantee asserts that:

> 'Nevertheless, the joint venturers recognise that:
>
> 54.1 the existence of sites of significance is not always known and that diligent precaution need to be taken to minimise the risk of proposed operations interfering with the same;
>
> 54.2 the participation of traditional owners in heritage surveys is an invaluable aid in seeking to minimise such risk;
>
> 54.3 despite….
>
> accordingly, Grantee Party intends to take such measures as a reasonably open to it in order to seek to minimise the risk of infringing the provisions of the Heritage Legislation inadvertently. (see Hutton affidavit 34-35 and 49-51, and the Kennedy affidavit 16–19, 26, 30–34, 39–40'.

[75] As discussed in paragraph 52 above, in [17] and [18] of the grantee's contentions, the grantee party states that it intends to work cooperatively with the traditional owners of the land regardless of whether there is a formal agreement in place and fully cooperate with the native title party to avoid acting in a manner which could breach the AHA. Further at paragraph [19], the grantee party contends that it intends to respect the wishes of the native title party 'to explore every possible avenue reasonably and commercially open to them to accommodate the wishes and desires of the Native Title Party', while at the same time, not wanting 'to pursue an exploration endeavour where Native Title Party may unilaterally and free from challenge deny them the fruits of their endeavour'. At paragraph [20] of their contentions, the grantee warrants that they are aware of their obligations under the heritage legislation and fully intends to comply with them. Further, at contention [21] (which is repeated in the affidavit of Kennedy at [27]), the grantee says it: 'will strain to avoid interference with sites of significance of which they have knowledge, whether by virtue of such sites being registered in the register maintained under the Heritage Legislation, advice from the native title party or otherwise', but subject always to their rights to seek leave to disturb such sites pursuant to the AHA.

[76] Mr Thomas, in his affidavit at [20], deposes to the fact that he has:

> 'repeatedly advised Grantee Party and it is well aware and accepts that it must continue to seek to both consult with Native Title Party and secure Native Title Party's participation in inspections and surveys with a view to ensuring that the objects of the Heritage Legislation are fulfilled and not inadvertently breached'.

Mr Hutton at [35] states that he intends to 'take advice from an appropriately experienced anthropologist in relation to the requisite measures to be adopted to seek to minimise the risk of inadvertently interfering with the interests and sensitivities of the Native Title Party'. Earlier, at [29] he indicates he believed that there was a site of significance near the spring at the north end (i.e. *Jilgara*) and then goes on to say 'the spring area is a likely place for use as a camp site as it is shady but there is no reason to use it if it is a site of significance; it can easily be avoided by the Joint Venturers'. In paragraphs 36–48, Mt Hutton outlines a long history of interaction with the mining industry, the Kimberley and Aboriginal people, including in his pearling venture. From [60]–[64] of his affidavit, Mr Hutton discussed the question of the preferred model for the conduct of heritage surveys, indicating a preference for a work area clearance, rather than a work program clearance, which requires there to be new surveys conducted on the same area, on each occasion a new program of exploration is to be conducted. Mr Hutton at no point in that discussion dissents from the view that it is important that a survey be conducted. The question that he is concerned with relates to the

methodology to be employed during the conduct of the survey and not a question of whether the survey itself should be carried out.

[77] Mr Kennedy in his affidavit deposes the fact that the grantee party is well aware that there are many sites of significance which are not recorded on the register and, at paragraph 17, says that the grantee recognises that the best way of avoiding unintentionally infringing the provisions of the Heritage Act is to have the assistance of the traditional owners to identify the sites that ought to be protected by the Act. At [26], Mr Kennedy says that the grantee party wishes to meet personally with the native title party and believe that they would be able, in face-to-face meetings, to negotiate an agreement which would accommodate all the concerns of the native title party. Further at paragraph 27, as has been referred to earlier, he states that the grantee party would 'strain to respect the wishes of the Gooniyandi mob'. Between paragraphs 30 and 34, Mr Kennedy makes the point that the grantee has already demonstrated by virtue of the invitation it issued in relation to the conduct of the survey on the granted tenement, that even where it is not required under the terms of the Native Title Act or the AHA to conduct surveys, it is prepared to do so. Mr Kennedy emphasised that even where it could have proceeded to conduct the work, after the invitation was rejected, it did not do so for several reasons including deference to the Gooniyandi and inability to be completely convinced that the area was free of sites. Mr Kennedy deposes to the fact that he has assured himself that the grantee and its various directors and employees understand that it is necessary to work with traditional owners on a good neighbourly basis and be supportive of preservation of Aboriginal traditions and respecting Aboriginal cultural sensitivities.

[78] At paragraph 40(d), Mr Kennedy deposes that the grantee:

> 'would very much like to and, as far as it is proper, will continue to seek to, consult directly with Gooniyandi but to date contact with Gooniyandi has been mostly indirect through the KLC in recognition of KLC's representations that it acts for, and contact with, Gooniyandi should be through KLC'.

It is a little unclear as to whether the grantee intends to continue to discuss these matters with the Gooniyandi if they persist in insisting that they are represented by the KLC. If that is the case, it would be unfortunate. I assume on the basis of the qualification 'as far as it is proper' that they will in fact continue to conduct discussions through the native title party's legal representatives for as long as the native title party requires them to do so.

[79] I also refer to paragraph 50 above, in which there is a discussion in relation to the question of the grantee's intentions concerning the exploration program which they intend to

conduct on the tenement area and how that program relates to the intended exploration activities to be conducted in the granted tenement.

[80] In recent times, the Western Australian government has updated its version of the *Guidelines for Consultation with Indigenous People by Mineral Explorers, for Mineral and Petroleum Exploration* which is forwarded to all grantees with exploration licences, and indeed, amended the AHA to increase penalties, amongst other things. The government has also instituted Regional Standard Heritage Agreements, which are commonly used in other parts of the State, but are not relevant to this matter.

[81] The Tribunal has articulated its position in relation to these developments, most recently in *Linda Champion on behalf of the Central West Goldfields People/WA/Vosperton Resources Pty Ltd* (2005) 190 FLR 362, 1 February 2005, per Sumner DP. In essence, Deputy President Sumner found the revised guidelines and increased penalties increased the effectiveness of the government parties' regulatory regime for the protection of Aboriginal sites. However, that the Tribunal will continue, in any particular case, to have regard to the evidence presented before determining that the protective regime is sufficient to make it unlikely that here would be interference with sites of particular significance which had been found to exist (see [69]–[72]). I respectfully agree with those conclusions, and in this matter—while I take into account the impact of the AHA and other protective measures taken by the Western Australian government—it remains a matter of fact as to whether that regime will work effectively to make any disturbance of sites of particular significance unlikely. Crucial, in my view, to making that assessment is the question of the position adopted by a grantee party who does not have an agreement with the native title party in relation to protection of heritage.

[82] The government party contends that the Tribunal is bound by the decision of Nicholson J in *Little v Western Australia* [2001] FCA 1706 at 70 to the effect that the protective provisions of the AHA make the chance of interference with sites of significance remote. In *Little*, Nicholson J commented to the following effect (referring to section 16, 17 and 18 of the AHA):

> 'For the applicants it is submitted, therefore, that the Aboriginal Heritage Act does not provided unqualified protection in these provisions but merely makes it an offence to damage sites contrary to the Act. Furthermore, the power of the Minister under s 18 to remit a breach of s17 may occur in circumstance where a native title party has no right under the Act to make submissions to the Minister. Nevertheless, I do not consider it can be said it is likely such interference would occur given the protective effect in sections in the *Aboriginal Heritage Act*. In other words, the chance of such interference is not real and is remote in those circumstances.'

The Tribunal has considered this question on numerous occasions, most recently Deputy President Sumner, in *Maitland Parker* at 35, in making reference to a number of cases said:

> 'The Tribunal has always given significant weight (as it must) to the finding but does not interpret it as meaning that in all cases the protective regime will be adequate to make the s 237(b) interference unlikely…Each case must be considered on its particular facts. What is clear is that the Tribunal is entitled to have regard and give considerable weight to the Government party's site protection regime.'

I agree with those comments and adopt them for the purposes of this determination.

[83] In recent years, the Tribunal has considered very similar matters on a number of occasions. In addition to the *Maitland Parker* case referred to in paragraph 80, I refer to *Paddy Neowarra on behalf of Wanjina/Wnggurr/Wilinggin/Wilfred Byuneck & Ord on behalf on Uunguu/Western Australia/Swan Cove Enterprises* [2007] NNTTA 11 per DP Sumner; *Mark Lockyer* per Member Sosso; *Wobby Parker & Ors on behalf of Martu Idja Bunyjma People/Western Australia/Pilbara Iron Ore Pty Ltd* [2006] NNTTA per Member O'Dea; *Miriuwung Gajerrong No 1 (Native Title Prescribed Body Corporation) Aboriginal Corporation/Western Australia/Seawood Holdings* [2006] NNTTA 74 per DP Sumner; *Wilfred Hicks Woong-goo-tt-oo people/ Western Australia/Geotech International* [2006] NNTTA 63 per DP Sumner; *Banjo Wurrunmurra & Ors on behalf of Bunuba; Butcher Cherel & Ors on behalf of the Goondiyandi Native Title Claimants/Western Australia/ Wasse Stewart Askins* [2005] NNTTA per DP Sumner; *Cheinmora Dolores & Ors on behalf of the Balanggarra Native Title Claimants/Herron Resources Ltd/Western Australia* [2005] NNTTA 99 per Member O'Dea; and *Dora Sharp & Ors on behalf of the Gooniyandi Native Title Claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western Australia* [2004] NNTTA 31 per Member O'Dea.

[84] Those cases are the source of a number of observations from the various members concerned, which are relevant to consideration of the question of the likelihood of interference in circumstances of this kind. In *Neowarra*, DP Sumner observed that in the circumstances of proceedings of this nature, where information in relation to sites of significance which are not on the register, is put before the grantee party in the course of those proceedings, the grantee party's recourse to a s 62 defence is effectively nullified: 'Knowledge of these sites means that the grantee party will be unable to avail itself of the defence in s 62 of the AHA, when charged with an offence under it' (at [27]). In that matter there was no evidence before the Tribunal, as to the grantee's attitude towards compliance with the AHA. Nevertheless, the Tribunal determined that despite the fact that the grantee party had engaged in ultimately unsuccessful negotiations with the native title party in

relation to a heritage agreement, the Tribunal could infer on the balance of the evidence that the grantee party was aware of its responsibility to comply with the AHA and that any risk of interference was remote.

[85] In the *Banjo Woorroomarra* matter, DP Sumner was confronted again with a situation where the grantee party had not submitted any evidence, albeit that it was clear that the parties had attempted to reach an agreement by negotiation prior to the matter coming to determination. The grantee party in that matter had indicated that they were willing to sign an Aboriginal heritage agreement but not prepared to execute one in the form presented by the native title party. In the circumstances, DP Sumner decided, given that the grantee party had provided no indication of its intended manner of exploration, that there was a likelihood of interference even though he was satisfied the grantee party was aware of its responsibilities under the AHA (see [33]).

[86] In *Miriuwung Gajerrong* matter the grantee party had not submitted any evidence on its behalf, but there was evidence that there had been attempts to reach agreement in relation to heritage protection prior to the matter going to determination. DP Sumner was satisfied that the grantee party was aware of his responsibilities under the AHA but, having not given any indication of the manner in which it intended to conduct its exploration, he found that there was a real risk of interference with the sites even if such interference was inadvertent (see [45]–[46]).

[87] Further, in the *Hicks* matter, it was clear that the grantee party was prepared to execute a Regional Standard Heritage Agreement, and that the negotiations had broken down not over a disagreement relating to the need for heritage protection, but the manner of its achievement. DP Sumner came to the conclusion that he was satisfied that the protective regime meant that there was no real risk of interference. He noted, in particular, that the grantee party was now aware of sites on the register and aware of concerns about sites which were not on the register but had become apparent as a result of the proceedings (at [29]).

[88] In *Mark Lockyer*, Member Sosso found that there was not likely to be interference with sites of significance in circumstances where the information provided by the grantee party was limited, albeit, that it had contended that 'it is bound by, and commits to observe fully, the provisions of the *Aboriginal Heritage Act* 1972' (at [56]). In that matter, the parties had attempted to reach an agreement but had failed to do so. In the circumstances, Member Sosso found that there were no sites of significance, however, he concluded that if there had

been, he was of the view that the presumption of regularity would have ensured that no interference would have occurred (at [60])

[89] In *Wobby Parker*, I note at [44], that the willingness of a party to enter into a heritage agreement, that is unacceptable to the other, is not sufficient in itself to conclude that there is not likely to be interference with sites of significance. Further I note there that the Tribunal has determined that there is likely to be interference with sites, on a number of occasions, while noting the attempts and willingness of the grantee party to enter heritage agreements to deal with site identification and protection, albeit not one acceptable to the native title party (see paragraph 44 and the cases referred to therein). I also note at [45] in that matter, that the particular case could be distinguished from *Banjo Wurrunmurra, Miriuwung Gajerrong No 1* and *Dora Sharp,* on the basis that in those matters there had been no agreement, or no undertaking to enter any agreement given, and the only protective mechanisms available were the presumption of regularity and Aboriginal heritage protection requirements of the State.

[90] In *Dolores Cheinmora,* I concluded, albeit in relation to s 237(a), that the uncontested fact that the grantee party had indicated a willingness to enter into an agreement, the content of which was annexed to an affidavit, was sufficient for me to find that it was unlikely that there would be interference (see [36]).

[91] The question of whether interference with the sites of particular significance on the tenement area is unlikely in these circumstances rests on a careful balancing of the evidence before me. On balance, I have reached the conclusion that there is no real risk of interference with the sites of particular significance to the native title party. If I had not had the benefit of the sworn evidence of the grantee's deponents concerning the manner in which they intended to conduct the exploration program in relation to the proposed licence, and the steps they intended to take in order to address the issues raised by the native title party in relation to ss 237(a) and 237(b), I would not have been satisfied that the risk was remote, and indeed, it may well have been real. After reaching the conclusion that the protective regime of itself was insufficient to render the risk remote, I had to consider whether the undertakings and indications given by the grantee party, unenforceable in any contractual sense, were sufficient to render a real risk remote. The native title party contended at paragraph 19 (as I have set out earlier in paragraph 61 above) that is was incumbent on the grantee to lead evidence of the basis on which the Tribunal can be assured interference, intentional or otherwise, is not likely, given the practical difficulties of locating and/or avoiding sites. I am

not convinced that this proposition is an accurate statement of the relevant law but, in any event, I am satisfied that the grantee party has met the burden attributed to it. Having considered the way in which the Tribunal and the Federal Court have dealt with these matters in the past, and on the basis of the sworn evidence of the grantee party in relation to both their exploration intensions and risk minimisation strategies, I have come to the view that there is no real likelihood that these sites will be interfered with, by this grantee.

[92] Consequently, s 237(b) is not attracted.

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

[93] Section 237(c) of the Act requires a predictive assessment of whether the grant of the proposed licence or the exploration activities undertaken upon the grant of the licence are likely to involve major disturbance to land or likely to create rights whose exercise are likely to involve major disturbance to land. The Tribunal accepts the law as enunciated by the Full Federal Court in *Dann v Western Australia* (1997) 74 FCR 391 and, more recently, in *Little & Ors v Oriole Resources Pty Ltd* (2005) FCAFC 243. The Tribunal must determine whether major disturbance is likely to occur from the viewpoint of the entire Australian Community, including the Aboriginal community, as well as taking into account the concerns of the native title party. As was put in *Silver* in the Northern Territory (2002) 169 FLR 1, the likelihood of major disturbance is to be considered from the viewpoint of the general community but regard should also be had to the perspective of the local community and to recognise, and factor into the analysis, cultural differences, particularly as they pertain to the laws and customs of the claimant group.

[94] The native title party contends that the incidents of the grant of an exploration licence under the Mining Act 1978 WA permit activities including: reverse circulation drilling, diamond drilling, excavation of a 1000 tonnes of material, creation of exploration tracks, drill pads and the excavation of minerals. Consequently, in their view, the creation of those rights even in circumstances where the grantee party has indicated that it does not intend to exercise those rights to the full, is sufficient to found a determination by the Tribunal that the grant of the tenement will amount to major disturbance. The evidence of Mr Dawson, under the heading *Major disturbance to land and waters,* essentially continues to address his perception of the likely impact of the grant of the tenement on the area in the context of the conduct of social and community activates and from the point of view of the protection of sites of particular significance. It also contains the final three paragraphs which have been quoted at paragraph 58 above where Mr Dawson states his concerns about the activities associated with

the grant of the tenement. Mr Street similarly largely reiterates the concerns which had been expressed in relation to community and social activities and sites of particular significance, without giving any evidence, that I can ascertain, which advances an argument that any of the activities authorised by the tenement, or rights created under the grant of the tenement, will lead to a major disturbance.

[95] In these circumstances I conclude that there is simply insufficient evidence to establish any potential major disturbance, or any disturbance over and above the matters which have previously been discussed in relation to the first two limbs of s 237.

[96] Consequently, s 237(c) is not attracted.

Determination

[97] The determination of the Tribunal is that the grant of Exploration Licence E80/3266 is an act attracting the expedited procedure under the Act.

Daniel O'Dea
Member
1 March 2007