NATIONAL NATIVE TITLE TRIBUNAL

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

Application No: WO05/753

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

- and –

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

Maitland Parker and Others on behalf of Martu Idja Banyjima (WC98/62) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Derek Noel Ammon (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Hon C J Sumner, Deputy President
Place: Perth
Date: 2 June 2006

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – not likely to be interference with the carrying on of community or social activities, sites of particular significance or major disturbance to land – act attracts the expedited procedure – definition of Aboriginal site considered.

Legislation: *Native Title Act* 1993 (Cth) ss 29, 148(a), 151(2), 155, 233, 237
Mining Act 1978 (WA) s 111
Aboriginal Heritage Act 1972 (WA) ss 4, 5, 16, 17, 18

Cases:	*Banjo Wurrunmurra and Others on behalf of Bunuba Native Title Claimants; Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Bernfried Gunter Wasse, James Ian Stewart, Paul Winston Askins*, NNTT WO04/136 and WO04/137, [2005] NNTTA 90 (2 December 2005), Hon C J Sumner
	Champion v Western Australia [2005]NNTTA 1; (2005) 190 FLR 362
	Dann v Western Australia [1997] FCA 332; (1997) 74 FCR 391
	Little v Western Australia [2001] FCA 1706; (2001) 6(4) AILR 67
	Little & Others v Oriole Resources Pty Ltd [2005] FCAFC 243
	Smith v Western Australia [2001] FCA 19; (2001) 108 FCR 442
	Walley v Western Australia [2002] NNTTA 24; (2002) 169 FLR 437
	Western Australia v Ward (1996) 70 FCR 265
Hearing Dates:	15 December 2005 30 March 2006 5 May 2006
Solicitor for the native title party:	Mr Paul Sheiner, Christensen Vaughan
Solicitor for the Government party:	Mr Trevor Crewell, State Solicitor's Office
Representative of the Government party:	Mr Clyde Lannan, Department of Industry & Resources
Solicitor for the grantee party:	Mr Marcus Holmes, Taylor Linfoot & Holmes

REASONS FOR DETERMINATION

Background

[1] On 13 July 2005, the Government party gave notice under s 29 of the *Native Title Act* 1993 (Cth) of its intention to grant exploration licence E47/1385 ('the proposed licence') to Derek Noel Ammon ('the grantee party') and included in the notice a statement that it considered that the grant attracted the expedited procedure (that is an act which can be done without the normal negotiations required by s 31 of the Act).

[2] Mr Ammon is Executive Director of Iron Ore Holdings Ltd ('IOH') and on grant the exploration licence will be transferred to IOH. Reference throughout these reasons to the grantee party includes IOH unless otherwise indicated.

[3] On 9 November 2005, Maitland Parker and Wobby Parker on behalf of Martu Idja Banyjima People ('the native title party'/'MIB') made an expedited procedure objection application to the Tribunal relying on all three limbs of s 237 of the Act. The native title party's application for a determination of native title was entered onto the Register of Native Title Claims from 29 September 1998.

[4] The proposed licence comprises an area of some 120.43 square kilometres, 87 kilometres north-westerly of Newman in the Shire of East Pilbara, and is overlapped 80.83 per cent by the registered claim of the native title party. The registered native title claim of the Innawonga and Bunjima People (WC96/61) also overlaps 23.69 per cent of the proposed licence area and that of the Nyiyaparli People (WC05/6, previously pre-combination WC99/4) overlaps 19.17 per cent of it. As such each of these registered native title claimant groups is also accorded the status of native title party, but neither group has lodged an objection in relation to the proposed licence.

Conduct of the inquiry

[5] In accordance with its normal Procedures under the Right to Negotiate Scheme, on 30 November 2005, the Tribunal gave directions to the parties to provide contentions and documents for an inquiry to determine whether or not the expedited procedure is attracted. The directions also allowed a four month period from the s 29 objection closing date of 14 November 2005 for parties to negotiate or finalise agreement over the grant of the licence through the expedited procedure process. The Government party was to comply with the

directions by 7 March 2006 and the native title party by 13 March 2006. However, at the preliminary conference convened on 13 December 2005 the Tribunal was advised by Mr Marcus Holmes, counsel for the grantee party, that the grantee party considered that it already had executed a heritage agreement with the native title party who were then represented by the Pilbara Native Title Service ('PNTS'), which is the service delivery arm of Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation ('Yamatji'), the organisation recognised as the native title representative body for the region. The agreement is in the form of a Regional Standard Heritage Agreement ('RSHA'). As a result, the grantee requested that the matter proceed to inquiry expeditiously and requested a directions hearing to determine amended dates for compliance with directions. At the directions hearing on 15 December 2005, Mr Paul Sheiner, counsel for the native title party, accepted that an agreement dated 27 January 2005 had been signed between the grantee party and PNTS but advised that he was not aware of it at the time the objection was lodged and PNTS had not represented the native title party since July 2005. On that basis Mr Sheiner sought time to seek instructions from the native title party as to their authorisation of the agreement. Mr Holmes advised that the proposed licence was required for an iron ore exploration project and that his clients might be prepared to amend the RSHA to enable the native title party to conduct their own heritage survey rather than through PNTS or Yamatji. Mr Sheiner said he would seek instructions on this issue and to enable these issues to be further explored no change was made to the directions.

[6] On 13 February 2006 Mr Holmes advised that negotiations had been unsuccessful and that the grantee party still wished to proceed to Inquiry. Parties agreed that directions should remain as originally set. All parties have now submitted contentions, evidence and replies, including some additional material lodged at my direction addressing the issue of whether Ministerial approval to explore for iron ore on the subject licence pursuant to s 111 of the *Mining Act* 1978 (WA) should be or will be the subject of a further s 29 notice. The native title party initially requested that the matter be heard on country, but following resistance from the Government and grantee parties to this proposal, and the opportunity to submit further evidence, all parties have now agreed to the making of a determination on the papers. I am satisfied that I can adequately deal with the matter in this way in accordance with s 151(2) of the Act.

The status of the RSHA dated 27 January 2005

[7] There is no doubt that an agreement in the form of a Regional Standard Heritage Agreement ('the RSHA') has been signed by Simon Hawkins, Director of Yamatji as agent for the three claimant groups who are the native title parties in these proceedings. The agreement is also signed by Derek Ammon the grantee party. RSHAs are an initiative of the Government party and have been negotiated in various regions of Western Australia between the native title representative bodies, Government and peak industry bodies. The Government party's policy in relation to them is described in *Champion v Western Australia* [2005] NNTTA 1; (2005) 190 FLR 362 ('*Champion*') at [15]-[24]. In short, a RSHA provides for the protection of Aboriginal heritage and the conduct of heritage surveys. If executed by the grantee party the Government party asserts that the grant of a prospecting or exploration licence attracts the expedited procedure when giving notice of the future act under s 29 of the Act. It is part of an RSHA that a native title party will not object to the expedited procedure. Clause 15 of the RSHA says that the claimant group will withdraw an existing objection within seven days of the date of the agreement, not make further objections to the grant and enter into any further or supplementary agreement (including an agreement of the type referred to in s 31 of the Act) necessary to perfect the grant.

[8] In the present matter, as the Government party's requirements for the expedited procedure had been met, notice of the grant asserting the expedited procedure was given on 13 July 2005. By the time the objection was lodged on 9 November 2005 Mr Sheiner was acting for the MIB native title party. It appears that in July 2005 the MIB native title party decided that it no longer wanted to be represented by PNTS or Yamatji. After making enquiries Mr Sheiner informed the Tribunal that the RSHA was not authorised by his clients as they had not agreed to the RSHA process. Mr Sheiner also advised of his intention to explore with Yamatji the basis on which the agreement was authorised. No detailed information has been received by the Tribunal as a result of these inquiries but Mr Sheiner's clients continued to challenge the authorisation by Yamatji and insist on its alternative heritage agreement. Negotiations about an alternative agreement took place but without success.

[9] On the face of it the RSHA is a binding agreement which requires the native title party not to object to the grant of the proposed licence. Mr Holmes for the grantee party submitted early in the proceedings that the Tribunal should proceed to make a determination on the basis that there was a valid agreement in place which required the native title party not to object to the expedited procedure or the grant of the tenement. I ruled that even if the RSHA is a valid agreement, the Tribunal has no power in these proceedings to in effect recognise the agreement by dismissing the objection or making a summary determination that the expedited procedure is attracted on the basis of it. Section 148(a) empowers the Tribunal to dismiss an objection application if it is satisfied that it is not entitled to deal with it (often referred to as a dismissal based on a lack of jurisdiction), for instance if there is no registered native title claimant or native title party over the area of a proposed tenement. Even if an argument could be made out that if a RSHA of this kind existed and an objector was refusing to withdraw an objection despite a clear contractual obligation to do so, the Tribunal could dismiss the objection under s 148(a), that is not the present case. Here there is a dispute about whether the agreement was properly entered into. Despite limited information on the issue there is no doubt that a dispute exists about the validity of the agreement and particularly whether Yamatji were authorised to enter into it on behalf of the native title party. In these circumstances the Tribunal is obliged to conduct an inquiry and make a determination based on the factors in s 237. This does not mean the RSHA is completely irrelevant. The fact that the grantee party is prepared to enter into it is a relevant factor when considering the grantee party's attitude to the protection of sites of significance and whether they are likely to be interfered with (*Champion* at [29]-[32]) (and see below).

Section 111 of the *Mining Act*

[10] Section 111 of the *Mining Act* 1978 (WA) provides that an exploration licence does not authorise the holder to explore for iron ore unless the Minister authorises the holder to do so and endorses the licence accordingly. The native title party initially contended that the Ministerial authorisation constituted a separate future act and that it was not open to the Tribunal in this inquiry to consider the potential effect of exploration for iron ore by the grantee party. Subsequently, this contention was not pursued on the basis that the grantee party had provided no evidence of what exploration he intended and that the act should be considered on the basis that the grantee party would exercise to the full the rights accorded to an exploration licence. The Government party and grantee party disputed this contention.

The grantee party has in fact provided some indication of its intentions which include exploration for iron ore and on this basis I propose to make some comments on the s 111 contention.

[11] The Government party explained that the process to obtain Ministerial approval is that on application for an exploration licence the applicant usually indicates whether it intends to explore for iron ore but may do so subsequently. On grant of an exploration licence or subsequently the Government party decides whether there are reserves of iron ore over the area of the proposed licence. If there is not then it is unlikely that iron ore exploration would be approved. Once the prospectivity of the area for iron ore is established, the Minister's approval to the grant is sought including (along with other endorsements and conditions) an endorsement authorising exploration for iron ore. Usually the formal authorisation is given at the same time as the grant although there are occasions when the s 111 authorisation is given after the grant. Whether given at the same time or after the grant the issue is the same namely whether the Ministerial authority and the activities carried out pursuant to it have the capacity to affect native title in addition to any effect arising from the grant of the exploration licence. A future act is, by definition, one which affects native title (s 233 NTA). In my view the s 111 authorisation is not a separate future act from the grant of the exploration licence.

[12] The nature of an exploration licence has been fully dealt with in *Walley v Western Australia* [2002] NNTTA 24; (2002) 169 FLR 437 at [24]-[35]. These findings include a general description of what may be involved in exploration activities (at [29]) and there is no evidence to show that iron ore exploration is significantly different to exploration for other minerals. Section 66 of the *Mining Act* sets out the full extent of the rights conferred by an exploration licence. The authorisation under s 111 does not expand those rights and is limited only to permitting exploration for iron ore as well as other minerals. The exploration activities permitted by the licence remain the same but now apply to iron ore and will not affect native title to any greater extent than the original grant. Condition 4 to be imposed on the grant requires the approval of the Environmental Officer, Department of Industry and Resources ('DoIR') for the use of significant ground disturbing activity by mechanical equipment. This situation is similar to that involving an authorisation under s 111 of the *Mining Act*. The approval required by Condition 4 does not expand the rights which are given by the grant but regulates their use. The future act which affects native title is the grant of an exploration licence which permits the activities for which approval is given

administratively by Condition 4. In the same way the s 111 approval is given in circumstances where the basic rights which permit activities under an exploration licence and which affect native title have already been granted.

Legal principles

[13] Section 237 of the Act provides:

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

[14] In *Walley* I considered the applicable legal principles (at [7]-[23]) and the nature of exploration and prospecting licences and conditions to be imposed including what activities are permitted by it and what limits are placed on those activities (at [24]-[35]). I adopt those findings for the purposes of this inquiry.

Evidence in relation to the proposed act

[15] DoIR submissions reveal that the proposed licence area comprises the following tenure:

- Pastoral lease 3114/984, known as Marillana – 71.9 per cent; and
- Unallocated Crown land – 28.1 per cent.

[16] There are no Aboriginal communities in the vicinity of the subject area but the Register of Aboriginal Sites held by the Department of Indigenous Affairs ('DIA') pursuant to the *Aboriginal Heritage Act* 1972 (WA) documents 20 registered sites partially or entirely within the area of the proposed licence:

- Site ID 10101 – Clausen Spring - man-made structure, artefacts/scatter, camp – Permanent Register, Open Access, No restrictions

- Site ID 10102 – Meteorite Gorge - man-made structure, engraving, quarry, artefacts/scatter, grinding patches/grooves, camp – Permanent Register, Open Access, No restrictions
- Site ID 10103 – Petrogale Gorge - engraving, artefacts/scatter, grinding patches/grooves, camp - Permanent Register, Open Access, No restrictions
- Site ID 18422 – Y99-02 – artefacts/scatter – Interim Register, Closed Access, No restrictions
- Site ID 18418 – Y99-03 – artefacts/scatter - Interim Register, Closed Access, No restrictions
- Site ID 15205 – Yandi 53 – artefacts/scatter – Stored data, Open Access, No restrictions
- Site ID 15206 – Yandi 54 - quarry, ochre, rockshelter - Permanent Register, Open Access, No restrictions
- Site ID 9951 – Yandicoogina 20 – artefacts/scatter, water source - Permanent Register, Open Access, No restrictions
- Site ID 9960 – Yandicoogina 29/Barimunya - mythological (repository/cache), man-made structure, engraving, water source - Permanent Register, Closed Access, No restrictions
- Site ID 9965 – Yandicoogina 34 - artefacts/scatter, rockshelter - Interim Register, Open Access, No restrictions
- Site ID 9966 – Yandicoogina 35 – artefacts/scatter, rockshelter - Interim Register, Open Access, No restrictions
- Site ID 9967 – Yandicoogina 36 – artefacts/scatter, rockshelter - Interim Register, Open Access, No restrictions
- Site ID 7031 – Yandicoogina Rail Easement 4 – artefacts/scatter, rockshelter - Permanent Register, Open Access, No restrictions
- Site ID 7030 – Yandicoogina Rail Easement 5 – artefacts/scatter, rockshelter - Permanent Register, Open Access, No restrictions
- Site ID 18987 – Yandi Airfield Five – artefacts/scatter - Interim Register, Open Access, No restrictions

- Site ID 18988 – Yandi Airfield Four – artefacts/scatter - Interim Register, Open Access, No restrictions
- Site ID 18991 – Yandi Airfield One – artefacts/scatter - Interim Register, Open Access, No restrictions
- Site ID 18998 – Yandi Airfield Six, - artefacts/scatter - Interim Register, Open Access, No restrictions
- Site ID 18989 – Yandi Airfield Three – artefacts/scatter - Interim Register, Open Access, No restrictions
- Site ID 18990 – Yandi Airfield Two – artefacts/scatter - Interim Register, Open Access, No restrictions

[17] Barimunya (ID 9960), Y99-02 (ID 18422) and Y99-03 (ID 18418) are all listed as closed access records, although I note that the nine survey reports listed on DIA's survey report catalogue as being associated with Barimunya appear to be open access in three cases, and 'open with exceptions' in the case of the remaining five reports. DIA (Tanya Butler, Manager Heritage Information Unit) has advised the Tribunal that the latter status means that the reports are open to all viewers, but that certain sensitive sections of those reports may be masked in such a way that the reader cannot view them without written permission from the custodian for that particular site.

[18] The mapping and other documentation provided by the Government party and Tribunal shows extensive past and current exploration and mining interest in the area of the proposed licence and that adjacent to it. The Tengraph Quick Appraisal generated on 14 June 2005 shows one pending exploration licence (E47/928), two mining leases granted under State Mining Acts namely (A)M70/270 (*Iron Ore (Marillana Creek), Agreement Act 1991*), which is a large area located partly to the north-east of the proposed licence area and to the south-west which includes the Yandi mine and associated infrastructure, including a railway line; and A(M)70/274 (*Iron Ore (Yandicoogina), Agreement Act 1996*) located along the southern and eastern boundaries of the proposed licence area and which includes the Yandicoogina Mine including associated infrastructure, including a railway line and airfield. There are also three active general leases which are granted to facilitate infrastructure associated with mining, and two active miscellaneous licences partially overlapping the subject area.

A Quick Appraisal generated on 26 May 2006 shows a further three pending mining leases (M47/1360, M47/1361 and M47/1362) also entirely within the proposed licence area, the applicant for these leases also being Derek Noel Ammon. A further three 'dead' exploration licences and three 'dead' temporary reserves (titles similar to exploration licences issued under the 1904 *Mining Act*) also overlap the subject area to varying degrees, active between 1965 and 1997, although one exploration licence application was withdrawn prior to grant. I also note that File Notation Areas (FNA) shown on the Quick Appraisal and in Tengraph mapping evidence proposals for an accommodation village for Hammersley Iron Ore Pty Ltd within the southern boundary of the proposed licence (and within the native title party's overlap area) (FNA6438); and road, pipeline and railways access associated with the Hope Downs land proposals at the eastern end of the subject area (FNA5145) an area outside the native title party's claimed area.

[19] Tribunal documentation reveals that the concerns of native title claimants are evidenced by three objections to the assertion of the expedited procedure, lodged between 1999 and 2003 in relation to two exploration licences overlapping or abutting the subject area. Two objections were lodged in relation to exploration licences E47/1237 which was granted to IOH on 17 February 2004 and adjoins the proposed licence area to the south-east and west. Directly adjoining E47/1237 to the south of it is A(M)70/270 and the Yandicoogina mine. The two objections to E47/1237 were lodged by the MIB native title party (WO03/913), and by what was then the Innawonga Bunjima, Niapaili native title party (WO03/918) and were withdrawn following agreement on 27 November 2003. A third objection related to E47/928, applied for by Ausi Iron NL and abutting the northern boundary of the proposed licence, by the MIB (WO99/83**)** which was resolved by a consent determination that the expedited procedure does not apply but this tenement has not yet been granted.

[20] In summary, the proposed licence area is in the Hamersley Range and is surrounded by large iron ore mines and infrastructure on already granted mining leases which could also be utilised for the development of further mines. The grantee party and IOH have an interest in exploring iron ore reserves in the area covered by the already granted E47/1237 and proposed E47/1385 which are adjacent to each other.

[21] The grant of the proposed licences will be subject to the standard endorsements and conditions applicable to all exploration licences in Western Australia substantially the same as previously set out in *Walley* at [34], namely:

> ‘1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
>
> 2. All costeans and other disturbances to the surface of the land made as a result of exploration, including drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Industry and Resources (DoIR). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DoIR.
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> 3. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.
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> 4. Unless the written approval of the Environmental Officer, DoIR is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.’

[22] In addition there are a number of other conditions specific to this grant. These include conditions providing for notification to the pastoral lessee of the grant and of certain exploration activities, restrictions on mining activities in the vicinity of a number of Geodetic Survey Stations, several conditions concerned with access, safety, infrastructure construction and mining activities in the vicinity of the railway corridor and associated Safety Zones, and the preservation of right of access to, and operations associated with two miscellaneous licences 47/95 and 47/118. The endorsements (which differ from conditions in that a breach of them does not render the grantee liable to forfeiture of the licence) also draw the grantee party’s attention to the *Environmental Protection Act* 1986 and *Environmental Protection (Clearing of Native Vegetation) Regulations* 2004 and also confirm that the grantee is authorised to explore for iron pursuant to the approval of the Minister responsible for the *Mining Act* under s 111 of that Act.

[23] The Government party will impose the following additional condition on the grant of the licence:

> ‘In respect of the area covered by the licence the Licensee, if so requested in writing by the Martu Idja Banyjima People, the applicants in Federal Court application no. WAD 6278 of 1998 (WC98/62), such request being sent by pre-paid post to reach the Licensee’s address, C/- Taylor Linfoot & Holmes, Level 3, 40 St George’s Terrace, Perth WA 6000, not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of the Martu Idja Banyjima People the Regional Standard Heritage Agreement (“RSHA”) endorsed by peak industry groups and the Pilbara Land and Sea Council (sic).’

Native title party evidence

[24] The native title party has provided documentary evidence including affidavits, sworn on 17 May 2005 of Slim Parker and Timothy Parker, members of the native title party claimant group and Paul Antony Sheiner. The affidavits of Slim and Timothy Parker and some other evidence were the subject of a non-disclosure or 'confidentiality' directions pursuant to s 155 of the Act. In these reasons I have only referred to those documents to the extent necessary to explain my decision and have not included material which should according to customary law and traditions remain confidential.

Grantee party evidence

[25] The grantee party has provided documentary evidence including two affidavits sworn on 10 May 2006 and 25 May 2006 of Malcolm Roger Joseph Randall, Chairman and Executive Officer of IOH.

Community or social activities (s 237(a))

[26] The Tribunal is required to make a predictive assessment of whether the grant of the proposed licence and activities undertaken pursuant to it are likely to (in the sense of there being a real risk) that there will be interference with the community or social activities of the native title party (see *Smith v Western Australia* [2001] FCA 19; (2001) 108 FCR 442 at 449-450, ([23]) and see cases cited below). Direct interference involves an evaluative judgement that the future act is likely to be the proximate cause of the interference and must be substantial and not trivial in its impact on community or social activities (*Smith* at 451, ([26])). The assessment is also contextual taking account of other factors which may already have had an impact on a native title party's community or social activities (such as mining or pastoral activity) (*Smith* at 451, ([27])).

[27] The native title party contends that the native title party carry out community and social activities of hunting game, fishing and collecting bush food and medicine and for cultural and ceremonial purposes which will be directly interfered with particularly given the already existing restrictions on these activities because of nearby iron ore mines. The contentions are supported by affidavit evidence from Mr Slim Parker and Mr Timothy Parker. I accept that both persons are members of the MIB claim group with authority to speak on behalf of it. Much of their evidence is directed towards the significance of, in particular, the Barimunya site which is dealt with below.

[28] The evidence relating to community or social activities is relatively limited and refers principally to those associated with Law ceremonies which are conducted over a period of two or three months every year. Usually these are conducted near the community of Youngaleena which is some 75 kilometres to the north of the proposed licence area. Mr Slim Parker says that during Law business senior men with young men and boys go to an area in the southern eastern corner of the tenement area. They hunt kangaroo, fish and collect bush tucker as part of the activities associated with Law business. He says because of mining elsewhere on his country this is one of the few areas where bush food is available and where their activities can take place in relative isolation.

[29] I can readily accept that the extensive mining in the general area will have had an adverse impact on the community or social activities of the native title party and that past pastoral activities will also have limited to some extent the capacity to exercise native title rights and engage in community or social activities associated with them. It may be, but cannot on the evidence be said with certainty that the relatively limited evidence of current community or social activities on the proposed licence area is because the activities which occurred previously have been constrained by mining and pastoral pursuit. However the Tribunal must consider the evidence of the native title party's community or social activities as they are today. The MIB claim area in total is approximately 9554.395 square kilometres and extends to the Youngaleena community and beyond. Given the extensive nature of the claim area I can infer that there will be large tracts of land where the community and social activities related to the native title rights and interests can be carried out.

[30] The tenement to be granted is for exploration, not mining to which different considerations might apply. The exploration potentially can occur anywhere over 120.43 square kilometres but the restrictions imposed on the native title party when exploring occurs will be limited to the area of exploration. Intensive exploration is not likely to occur over the whole area at the same time. The grantee party does not gain exclusive possession to the area so any restriction on the native title party's community or social activities would be of a practical nature for safety reasons, limited to the area where exploration is taking place. It would also be temporary. While the ceremonial and other activities associated with it are of undoubted importance to the native title party, the evidence does not support a finding that there are frequent and regular activities which are likely to be interfered with. There may be some intermittent interference with the community and social activities referred to by

Mr Parker but there is no real risk that this impact will be substantial. I note, however, that the evidence related to this ceremonial activity also suggests that there may be a site of particular significance in the area which is considered under s 237(b).

Sites of particular significance (s 237(b))

[31] The major issue which emerged in this case is whether there is likely to be interference with any sites of particular significance to the native title party in accordance with their traditions. The native title party contended that Barimunya was an important site and that the regulatory regime under the *Aboriginal Heritage Act* 1972 (WA) did not provide adequate protection for it. Evidence was also given to refute the presumption of regularity usually relied on by the Tribunal that the grantee party will comply with all applicable law and regulations.

[32] The predictive approach applies to all limbs of s 237. It was summarised by Nicholson J in *Little v Western Australia* [2001] FCA 1706; (2001) 6(4) AILR at [69]-[70], [72]:

> '69 It was the *Native Title Amendment Act 1998* which substituted the words "is not likely to" for the words "does not" in pars (a), (b) and (c) of s 237 of the Act. In *Dann v Western Australia* (1997) 74 FCR 391, the Full Court ruled in favour of the approach taken by Lee J in *Western Australia v Ward* (1996) 70 FCR 265 at 278 - 279 that the Tribunal's task on the language of the section as it was then was to access the potential consequences of the exercise of the right and it was not required to determine the degree of likelihood that the consequences would in fact occur. That was in contrast to the predictive assessment approach adopted by Carr J in *Ward v Western Australia* (1996) 69 FCR 208 at 222 and in *Dann* at first instance (1996) 142 ALR 21 at 37 - 38. I agree with French J in *Smith on behalf of the Gnaala Karla Booja People v State of Western Australia* [2001] FCA 19 at [23] that the effect of the amending act is that the Tribunal is required to assess whether, as a matter of fact, the proposed future act is likely to give rise to the interference or disturbance referred to in pars (a), (b) and (c) of s 237 so that a predictive assessment is involved being one not confined to a consideration of the legal rights conferred by the grant of the proposed tenement.
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> 70 In *Smith* at [23], French J also held that consistently with the objects of the Act, the word "likely" requires risk assessment by the Tribunal that will exclude from the expedited procedure any proposed act which would involve a real chance or risk of interference or major disturbance of the kind contemplated by s 237. He supported that view by reference to *Tillmanns Butcheries Pty Ltd v Australian Meat Industry Employees' Union* (1979) 27 ALR 367 at 375 (Bowen CJ) and 380 - 381 (Deane J) and to *Jungarrayi v Olney* (1992) 105 ALR 527 at 537 - 538. He therefore did not accept that the term "likely" was directed to a judgement on the balance of probabilities as to interference or major disturbance. For the Grantee, it is submitted that *Smith* should not be followed in this respect and that the balance of probabilities approach should be favoured as being consistent with the nature of predictive assessment.
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> …
>
> 72 In his judgment, French J set out the amendments to s 237 of the Act and the explanatory memorandum. I agree with the submission for the applicants that neither of these compel the conclusion that the word "likely" in s 237 means more probable than not. Having examined the authorities relied upon by French J - namely *Tillmanns Butcheries* and *Jungarrayi* - I consider that the decision reached by him should be followed.'

This approach was endorsed most recently by the Full Federal Court in *Little v Oriole Resources Pty Ltd* [2005] FCAFC 243 (per French, Stone and Siopsis JJ at [41]-[51].

[33] The Tribunal has considered Western Australia's site protection regime in the context of s 237(b) on many occasions. Given the importance of this issue in these proceedings I repeat and adopt the following findings:

- *Walley* at [50]-[51]

> [50] The exploration licence will contain an endorsement (not a condition) drawing the attention of the grantee party to the provisions of the *Aboriginal Heritage* Act 1972 (WA). The operation of the *Aboriginal Heritage Act* in Western Australia can be summarised as follows. It contains provision for the protection and preservation of Aboriginal sites. Section 17 creates an offence for a person to excavate, destroy, damage, or in any way alter an Aboriginal site unless acting with the authorisation of the Registrar of Aboriginal Sites under s 16 or the consent of the Minister under s 18. Section 16 allows the Registrar on the advice of the Aboriginal Cultural Material Committee, set up to assist in the administration of the Act, to authorise the excavation of an Aboriginal site and the removal of anything on or under it. Section 18 provides for the Minister to consent to the use of land which otherwise might result in a breach of s 17. A defence to a prosecution under s 62 of the *Aboriginal Heritage Act* is provided for in circumstances where the person charged can prove that he did not know and could not reasonably be expected to have known that the place was a site to which the Act applies. In all cases when an exploration licence is granted the Department of Mineral and Petroleum Resources sends to the licensees a document entitled *Guidelines for Aboriginal Consultation by Mineral and Petroleum Explorers.* This document outlines the relevant legislation including the *Aboriginal Heritage Act* and contains detailed guidelines relating to consultation with the Aboriginal people including information about various methods of ensuring that there is no interference with Aboriginal sites.
>
> [51] Using the presumption of regularity, the Tribunal has generally found that this regulatory regime is adequate to ensure that there was not likely to be interference with sites of particular significance. In part this conclusion was based on the defence not being available to a person who interfered with a site, given the endorsement on the licence and that the Guidelines would have put them on notice of their obligations under the *Aboriginal Heritage Act.* This approach was recently endorsed by RD Nicholson J in *Little* (at [77]). In other matters, because of the number and nature of sites or because whole areas were regarded as of particular significance, the Tribunal has found that the expedited procedure was not attracted. (*Wilma Freddie/Western Australia/Stephen Grant Povey*, NNTT WO99/882, Mrs Jennifer Stuckey-Clarke, 19 December 2001 and *Maureen Young (Ngadju People)/Western Australia/South Coast Metals Pty Ltd*, NNTT WO00/402, Mr John Sosso, 7 June 2001.) (Member Sosso also found that the concept of interference is potentially of wider impact than s 17 of the *Aboriginal Heritage Act*.)

- *Champion* at [68]-[72]

> [68] The issue here is whether there is likely to be (in the sense of a real risk of) interference with areas or sites of particular (i.e. more than ordinary - *Cheinmora v Striker* (1996) 142 ALR 21 at 34-35) significance to the native title party in accordance with their traditions. The fact that no sites are recorded on the Register kept under the *Aboriginal Heritage Act* does not mean that there may not be such sites over the area of the proposed licence. The Register does not purport to be a record of all Aboriginal sites in Western Australia and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters.

[69] The regulatory regime based on the *Aboriginal Heritage Act* 1972 (WA) has been described on numerous occasions by the Tribunal (I adopt the findings in *Walley* at [50]-[51]). The Federal Court (*Little* at [77]) found the protective effect of the *Aboriginal Heritage Act* 1972 (WA) such as to make interference with sites of particular significance unlikely.

[70] In addition to the RSHA described above the Government party has prepared an updated version of its '*Guidelines for Consultation with Indigenous People by Mineral Explorers by Mineral and Petroleum Exploration*' (July 2004) which is sent out to each grantee of an exploration or prospecting licence. The original Guidelines (1995) were considered by the Tribunal in *Re Waljen People* (*Roberta Thomas On Behalf Of The Waljen People/Western Australia/Sons Of Gwalia Ltd; Abador Gold NL; Acacia Resources*, NNTT WO95/17, [1995] NNTTA 28 (24 November 1995), Hon Paul Seaman QC) [1996] 1 AILR 227. The original Guidelines contained information about the *Aboriginal Heritage Act* 1972 (WA) and advise that an offence would be committed if a grantee party interfered with an Aboriginal site without authorisation. They pointed to the need for consultation with Aboriginal interests and provided details of how this may be done. They referred to the various site survey methods which are utilised to ensure that sites are not interfered with. The Department of Aboriginal Affairs (now Department of Indigenous Affairs) provided details of Aboriginal sites on the register kept by it to a grantee party inquiring about them and informs them that the *Aboriginal Heritage Act* 1972 (WA) protects all sites whether on the Register or not and recommends the engagement of qualified consultants to conduct ethnographic and archaeological surveys which should ensure that all Aboriginal groups are consulted so that all sites are avoided or identified. Based on these procedures Deputy President Seaman found that it was likely that the grantee party would consult with the native title party thus making it unlikely that there would be interference with any sites of particular significance. The Tribunal has also found that because of the notice of these procedures a grantee party may not be able to rely on the defence in s 62 of the *Aboriginal Heritage Act* 1972 (WA) that they did not know or could not reasonably be expected to have known of the existence of an Aboriginal site (*Walley* at [50]).

[71] The revised Guidelines are similar to those of 1995 and continue to draw attention to the limitations of the s 62 defence where no attempt has been made by a person charged with an offence under the Act of interfering with a site to obtain information about relevant sites. In addition the Government's policy on the use of RSHAs is spelled out and the importance of consultation reaffirmed with details of how the consultation should occur under the RSHA in the different NTRB areas where claimants have agreed to the RSHA. The Guidelines refer to substantial increases in penalties for breaches of the *Aboriginal Heritage Act* 1972 (WA) introduced in 2003 (s 57) to:

- in the case of an individual for a first offence, $20,000 and imprisonment for 9 months and for a second or subsequent offence, $40,000 and imprisonment for 2 years; and
- in the case of a body corporate, for a first offence $50,000 and for a second or subsequent offence $100,000.

In my view the combined effect of the revised Guidelines and increase in penalties under the *Aboriginal Heritage Act* 1972 (WA) is to enhance the effectiveness of the Government party's regulatory regime for the protection of Aboriginal sites.

[72] As in the past the Tribunal will continue, in particular cases, to have regard to whether this protective regime is sufficient to make it unlikely that there will be interference with sites of particular significance found to exist.'

[34] The Government contended that the Tribunal is bound by the decision of Nicholson J in *Little* at [69]-[70], [72] to find that the chance of interference is remote given the protective effect of the *Aboriginal Heritage Act*. After referring on to ss 16,17 and 18 of the *Aboriginal Heritage Act* 1972 (WA), Nicholson J concluded:

> '77 For the applicants it is submitted therefore that the *Aboriginal Heritage Act* does not provide 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 permit a breach of s 17 may occur in circumstances 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 of the sections in the *Aboriginal Heritage Act*. In other words the chance of such interference is not real and is remote in those circumstances.'

[35] The Tribunal has always given significant weight (as it must) to this 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 (see *Banjo Wurrunmurra and Others on behalf of Bunuba Native Title Claimants; Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Bernfried Gunter Wasse, James Ian Stewart, Paul Winston Askins*, NNTT WO04/136 and WO04/137, [2005] NNTTA 90 (2 December 2005), Hon C J Sumner and cases cited therein at [35] for a recent example). 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.

[36] The owner of land who wishes to obtain the consent of the Minister to a use which would otherwise result in a breach of s 17 of the *Aboriginal Heritage Act* must give notice to the Aboriginal Cultural Material Committee ('ACMC'). The ACMC is then required to form an opinion on whether there is any Aboriginal site on the land, evaluate the importance and significance of the site and then make a recommendation to the Minister on whether consent should be given and if so what conditions should be applied to the consent (s 18(2) AHA). The Minister is not obliged to follow a recommendation of the ACMC but is required to consider it 'having regard to the general interest of the community' (s 18(3) AHA). An application for review of the decision may be made by any owner of the land who is aggrieved by the decision but no such right exists for the Aboriginal persons who were the informants for the site.

[37] The ACMC is currently comprised Indigenous people who represent the majority, assisted by professional persons with expertise in anthropology and archaeology.

[38] The DIA has prepared guidelines to help proponents to prepare a notice which provides information to the ACMC for its consideration of a recommendation to grant permission to interfere with a site under s 18 of the *Aboriginal Heritage Act*. This notice among other things requires the provision of maps and the location of known Aboriginal sites, a summary

of the consultation undertaken with relevant Aboriginal people and other stakeholders. This summary is to include the process used to consult and the basis for selecting those consulted and why other persons were not consulted; comments by Aboriginal people about the proposal; the outcomes of the consultation process; and the nature and outcomes of any heritage survey report.

[39] The RSHA (para 14) provides that the grantee party must consult about an application under s 18 of the *Aboriginal Heritage Act* by giving the native title party at least 30 days notice of its intention; consulting and meeting with them; and giving reasonable notice to the ACMC and Yamatji of the details of the consultation which has taken place.

[40] The fact that the Registrar of Aboriginal Sites (s 16) or the Minister (s 18) may authorise interference with Aboriginal sites means that the protection given is not absolute. Even if all the proper procedures are followed, the possibility of interference still exists. Despite this and for the reasons already given, the Tribunal has since the 1998 amendment to the Act and adoption of the predictive assessment approach said that the regulatory regime is usually effective in making interference unlikely in the sense described by the Federal Court.

[41] A consequence of the adoption of the predictive assessment approach is that the intentions of the grantee party are relevant to whether the interference and disturbance referred to in s 237 are 'likely' to occur (*Little* (*Full Federal Court*) at [57]; *Walley* at [9]). This includes the grantee's intention with respect to the protection of Aboriginal sites.

[42] I have no difficulty in finding that Barimunya is a site of particular significance to the native title party in accordance with their traditions. The evidence provided by Mr Slim Parker, Mr Timothy Parker and Ms Fiona Sutherland, Anthropologist with Australian Cultural Heritage Management in a letter to Paul Sheiner of 3 April 2006 were the subject of confidentiality orders because of the sensitive nature of the site. However, the native title party provided a copy of BHP Billiton's '*Aboriginal Heritage Induction Handbook*' which is publicly available and contains the following reference to Barimunya:

> 'The three large hills that dominate the landscape at Yandi are a significant ethnographic site known as Barimunya. In order to comply with the *Western Australia Aboriginal Heritage Act, 1972*. and the wishes of the heritage custodians BHP Billiton Iron Ore is committed to the management and protection of this site. To ensure this, an area of land surrounding the hills has been made a Designated Area. Part of this area has been fenced and marked with signs marking the Designated Area status.'

[43] The allocation of a Designated Area status to an area has no legal status but is a process internal to BHP Billiton and makes the area subject to special management measures.

[44] Ms Sutherland's evidence records that the site was initially recorded in 1980 and 1982 and that the site also embraces sites P2067 (Meteorite Gorge) and P2068 (Petrogale Gorge). The publicly available maps provided by DIA and prepared by the Tribunal show the area of the site to have a very large buffer zone, approximately 10 kilometres by 10 kilometres (see below). Within this larger area there are two areas of approximately one square kilometre each which adjoin each other. Additional maps prepared by the Tribunal show these to contain the Meteorite Gorge and Petrogale Gorge sites. Centrally located within the entire boundaries of the DIA and Tribunal map are also three hills called 'The Three Sisters', between 700 and 800 metres above mean sea level. The buffer zone also extends over approximately a half of the area of E47/1237. The significance of the Barimunya site was not contested by either of the other parties and there is no need to publish further details of the site or analysis of reasons for this finding. Suffice it to say that Barimunya is a very special traditional place for the native title party.

[45] The evidence of Messrs Slim and Timothy Parker also established the existence of an old Law ground which is still used by Banyjima, Nyiyaparli and other Aboriginal people. I accept it is a site of particular significance to the native title party in accordance with their traditions. It appears to be in the same vicinity as the area used by the native title party for ceremonial activities during Law business referred to above. Mr Slim Parker say it is 'to the east of the proposed tenement', Mr Timothy Parker says it is 'on the east side of the proposed tenement'. There is no evidence linking this site to any of the sites on the Register. The eastern end of the proposed licence area is not overlapped by the MIB claim and is only covered by the Nyiyaparli claim. The grantee party contended that this site was not on the area of the MIB claim and it is difficult on the evidence to locate it precisely. Nevertheless, the grantee party is now aware of the existence of this site and whether on the MIB or Nyiyaparli claim the grantee party will need to consult with the native title party to ensure that it is not interfered with if there is to be exploration in this area. I am satisfied that the grantee party will comply with its legal obligations in this respect.

[46] Leaving aside for the moment the contention that the presumption of regularity should not apply in this case because of the previous behaviour of the grantee party I am satisfied that there is not likely to be interference with the sites of particular significance which exist,

namely the Barimunya site and the Law ground which is possibly located in the east of the subject area.

[47] With respect to Barimunya the grantee party says (Randall affidavit – 10 May 2006**,** paras 5, 6) that IOH will comply with all its legal obligations and will endeavour to avoid Aboriginal sites but in the event that they need to be disturbed, the company will make application through the ACMC to the Minister for approval and comply with any conditions imposed by the Minister. As already explained, the possibility that a s 18 application may be made is not, since the amendment to the Act in 1998, decisive (as it was prior to 1998) in leading to a conclusion that there will be interference with sites of particular significance. This possibility has always been a part of the Government party's regulatory regime which has been considered by the Tribunal and Federal Court in *Little*. Its importance in deciding whether there is a real risk of interference with sites of particular significance will depend under the predictive assessment approach on all the circumstances. If the evidence were to be that exploration could not be carried out without avoiding sites or that a s 18 application was virtually inevitable then these circumstances would need to be given greater weight. It would still, however, need to be considered in the context of the number of sites, the consultative mechanism in place with the native title party through a heritage survey or otherwise and the attitude of the grantee party to site protection.

[48] In this case I have had regard to the following factors in deciding that there is unlikely to be interference with the Barimunya site.

- The existence of the site is well known and been the subject of earlier site surveys (including for BHP Billiton).

- Parts of the buffer zone (and possibly the actual site) are currently the subject of a heritage survey being carried out by MIB and the grantee party in relation to E47/1237).

- The most important part of the DIA delineated site area, the Three Sisters hills, are also within the Innawonga and Bunjima Peoples registered claimant area and any exploration will be the subject of a site survey conducted by them pursuant to the RSHA.

- While the grantee party has made application for a mining lease (M47/1360) which appears to be at least partially over the DIA delineated site, suggesting the possibility of future mining in the area, the future act with which the Tribunal is concerned here is an exploration licence only. A proposal to mine will be a separate future act and subject to the right to negotiate provisions of the Act not involving the expedited procedure.

- Before making a recommendation to the Minister the ACMC will be aware of the views of the Traditional Owners which will include members of the MIB and Innawonga and Bunjima claim groups.

- The agreement of the Traditional Owners with BHP which preceded the development of the Yandi mine recognised the significance of this area and restricted access to it by employees of BHP (Slim Parker affidavit).

- The native title party has not been opposed to exploration per se but has not been satisfied with the RSHA adopted by Yamatji. Negotiations have been about the type and cost of a site survey, not about whether a survey should be conducted.

- The Government party's condition (para [23] above) will provide the option for the MIB native title party to enter into a RSHA. I am aware of the contents of the RSHA a copy of which was tendered in this matter (see also findings in *Champion* at [21]). I can see no reason why the RSHA will not provide for an adequate Aboriginal heritage survey, something with which Yamatji, the native title representative body for the area with a special responsibility for looking after the interests of native title holders and claimants, by its endorsement of the RSHA agrees with.

- The grantee party is currently carrying out surveys with MIB and other native title claimants. Other groups have indicated that work programs will not interfere with sites such as the proposed drilling in the Phil's Creek area on E47/1237 which is within the DIA delineated area (see below).

Presumption of regularity

[49] The native title party is concerned that IOH do not have a proper commitment to Aboriginal heritage in that it:

1. commenced exploration activity before receiving a heritage survey conducted by the MIB native title party in September 2005;

2. did not use MIB heritage monitors in respect of an access road between two exploration sites on the exploration tenement (E47/1238) and graded a road which may have interfered with sites, carrying considerable hurt and distress to members of the claim group (Slim Parker affidavit – para 27); and

3. took from grab samples from the 'Three Sisters Project' (being E47/1237 and ELA47/1385) which disturbed the Barimunya site (Timothy Parker affidavit – para 14).

[50] The grantee party (Randall affidavit 10 May 2006 - para 14) 'absolutely refutes' the assertion about lack of commitment to Aboriginal heritage.

[51] With respect to the first allegation Mr Randall (affidavit 10 May 2006 - paras 15 and 16) says IOH completed a heritage survey with members of the MIB native title party (which was not participated in by either Slim or Timothy Parker) in 2005, in accordance with a 2003 heritage agreement. It only commenced exploration after the clearance, Mr Randall says. This evidence does not permit a finding adverse to the grantee party. The native title party's allegation is denied and there is no specific evidence of dates of receipt of the survey results by MIB and commencement of exploration.

[52] With respect to the second allegation the native title party has provided '*The Report of an Aboriginal Ethnographic Survey (Work Program Clearance) of Exploration Drilling at the Derek's Prospect, Lamb Creek Project Area (E47/1238), East Pilbara Region, Western Australia – November 2005*' prepared by Philip Haydock, Anthropos Australis Pty Ltd, for the Martu Idja Banjima People, Karijini Development Pty Ltd and Iron Ore Holdings Ltd which deals with the site clearance procedures for the access track. Exploration licence E47/1238 is located some 15 kilometres to the west of the subject area and is not directly relevant to the grant of the proposed licence. The evidence is presented as an example of the grantee party's lack of commitment to the protection of Aboriginal heritage. The report says (p 15) that the route and construction of the proposed access track was conditionally cleared with the condition being that IOH engages heritage monitors from the MIB native title party to walk along the proposed access track ahead of the bulldozer. Mr Randall accepts that the recommended monitoring did not occur but says that the 2003 heritage agreement does not require it nor is it a requirement under the *Aboriginal Heritage Act* 1972 (WA) or other

legislation. He says that the neighbouring claim group had already cleared the access road as free of Aboriginal sites. The grantee party maintains that monitoring is not necessary on tenements held by it but that it will agree to monitoring, if it is required, because of a perceived high risk of disturbance to sites.

[53] This allegation would be the most serious if in fact the 2003 heritage agreement provided for site clearance subject to conditions requiring the use of monitors, something denied by Mr Randall. The 2003 heritage agreement was not provided to the Tribunal nor is there evidence that it was in the form of a RSHA. I note, however, that there is nothing specific in the RSHA which provides for monitoring of exploration activity following a site survey. On the current state of the evidence it is not possible to decide that the grantee was in breach of its contractual obligations under the agreement. What can be said is that there is no evidence that the grading of the access road disturbed any Aboriginal sites or resulted in a breach of the *Aboriginal Heritage Act*. The proposed area was cleared by two registered claimant groups (including the native title party) before the grading occurred.

[54] With respect to the third allegation the grantee party provided a map which showed that the four grab samples were taken just outside of the Barimunya site buffer boundary, were taken from the already granted exploration licence E47/1237 and did not interfere with any site. There is no basis to dispute this evidence.

[55] Taking account of the allegations in the context of the evidence overall I cannot find that the grantee party has been so contemptuous of its obligations under the *Aboriginal Heritage Act* or existing agreements as to call into question the regularity of its future actions. I am satisfied that the grantee party is aware of its obligations under the *Aboriginal Heritage Act*, has entered into previous heritage agreements with the native title party and that the native title party have conducted site surveys pursuant to these in the past and are currently engaged with the grantee party in one related to E47/1237.

Drill holes on the Barimunya site

[56] The native title party contends that the drilling program proposed on E47/1237 (Phil's Creek) by the IOH will interfere with the Barimunya site and provided a map prepared by Dr Shaun Canning Archaeologist and Anthropologist, Operations Manager, Australian Cultural Heritage Management Pty Ltd who is a consultant to MIB to support its contention. The map provided establishes that drill holes are proposed on the Barimunya site buffer zone

and extend to approximately one kilometre from one of the adjoining kilometre square sites marked within the wider buffer zone delineated by DIA as the Barimunya site. The two adjoining squares mark the Meteorite Gorge and the Petrogale Gorge sites. With respect to this contention Mr Randall says (affidavit 25 May 2006 – para 6) that the proposed drilling site does not interfere with the Three Sisters Area which he says based on the BHP report referred to above are the three large hills that dominate the landscape at Yandi. He further says that the actual boundary of the Barimunya site is within the two squares surrounding the area of Three Sisters hills as shown on the DIA Register map and the Tribunal's overlay map (both publicly available documents).

[57] The grantee party asserts that it has not conducted any ground disturbing activity but has marked out grid lines referred to in its Quarterly Report dated 10 May 2006 (email Marcus Holmes to Paul Sheiner dated 10 May 2006). It also says that these grid lines involve marking out proposed drill holes at 100 metres intervals to indicate proposed lines for drilling and help guide the heritage survey teams to the drilling locations. Mr Holmes asserts that this methodology is allowed under the 2003 heritage agreement and is standard industry practice (see also Randall affidavit of 25 May 2006 – para 5). The Phil's Creek area appears to be part of the survey currently being carried out by the MIB native title party pursuant to the 2003 heritage agreement in relation to which the grantee party's expectation is that members of the claim group will attend the survey to indicate the location of any Aboriginal sites (Marcus Holmes' email – 10 May 2006). There is also evidence (Marcus Holmes' letter to Paul Sheiner – 18 May 2006, p 3) that the proposed exploration at Phil's Creek on E47/1237 has been cleared by the neighbouring claim group (Innawonga and Bunjima) as being free of Aboriginal sites. Resolution of this issue requires a consideration of the extent of the Barimunya site.

[58] If the Barimunya site is the whole of the area depicted on the DIA map, including what I have referred to above as the buffer zone, then drilling at Phil's Creek as proposed would disturb the site. If the actual extent of the site is in fact less than depicted on the DIA map then the proposed drill holes may not interfere with a site. Whether they will depends on whether the area to be drilled falls within the definition of Aboriginal site in ss 4 and 5 of the *Aboriginal Heritage Act* The evidence in respect of this matter can be summarised as follows:

1. Dr Shaun Canning says that the relevant site is DIA Site ID 9960 known as Yandigoogina 29/Barimunya and that the DIA boundary for the site is the only boundary and without DIA approval any interference within the area designated on the DIA map may constitute an offence under the *Aboriginal Heritage Act*.

2. The grantee partly relies on a statement in a letter from DIA to Mr Holmes of 10 May 2006 that 'the boundary of Site ID 9960 as shown on the Department of Indigenous Affairs website does not accurately represent the true boundary of the site. As per our policy; to protect the actual location of the site, we give a much larger area so that the true location of the site is not identified.'

3. *The Aboriginal Heritage Procedures Manual* (Department of Housing and Works in consultation with DIA) further explores this statement of policy (para 3.4 'Interpreting the results of a register search'). Prior to 1999 'Open' sites on the public Register were only mapped to within a one kilometre square grid and in the case of 'Closed' sites within a 10 kilometre square grid to protect them. The policy has now changed in an attempt to gain greater accuracy on location. A 'Closed' or 'Vulnerable' site is represented by a two kilometre square box or aggregate of boxes where the site is extensive. If there is insufficient data for sites in this category then a 10 kilometre square box is used until more information is received. 'Open' sites are more precisely designated to reflect their size, shape and extent where location information is accurate by circles of 500 metres, one kilometre or two kilometres where further information is necessary. The Procedures Manual then gives details of other map designations which are specified depending on the circumstances.

[59] This issue must be considered and in my view is easily resolved by reference to the relevant statutory provision. Section 5 of the *Aboriginal Heritage Act* applies that Act to an Aboriginal site defined as:

> '(a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
> (b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
> (c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

> (d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.'

There is nothing in the *Aboriginal Heritage Act* or Regulations which qualifies this definition in any way or in particular provides for the actual boundaries of a site to be defined by geospatial references. Geospatial boundaries are given to sites on the Register by administrative action and depending on the circumstances may include a large buffer zone around the actual site. For an offence to be committed under s 17 an Aboriginal site as defined must be interfered with. Because of the nature of the definition (particularly s 5(b)), DIA have put in place administrative procedures to ensure, as far as possible, that the views of relevant Aboriginal people are obtained about the importance or special significance of a site to them through the conduct of heritage surveys. I am satisfied that the boundaries designated on the DIA map derived from the Register do not necessarily and probably in most cases do not reflect the true boundaries of the site.

[60] In the case of the Barimunya site I find that the DIA boundaries allow for a substantial buffer zone around the actual site. I do not accept Mr Randall's assertion that the true extent of the Barimunya site is represented by the two adjoining one kilometre square boxes within the broader DIA boundary. Both the DIA map and the Tribunal map show the peaks of 'The Three Sisters' hills to be outside and to the south and west of the adjoining boxes. As already explained an examination of the coordinates provided by DIA in fact shows these square boxes to be Petrogale Gorge and Meteorite Gorge. However, I note that both these sites have an open access, with respect to the material held, which corroborates other evidence provided that not the whole of the Barimunya site or information relating to it is restricted.

[61] In summary, my finding is that the Barimunya site does not extend over the whole of the area designated in the DIA map but extends beyond the area of the two adjoining boxes. The area currently proposed for drilling at Phil's Creek on E47/1237 is located within the boundaries of the buffer zone and some distance to the east of the Petrogale Gorge and Meteorite Gorge. Whether the area currently proposed for drilling at Phil's Creek is part of a site as defined by the *Aboriginal Heritage Act* will need to be ascertained as part of the agreed survey process. If the proposed licence E47/1385 is granted and it is proposed to explore in an area that could constitute the Barimunya site (as defined) then it will be necessary for a heritage survey to be carried out to ascertain the precise boundaries of the site. I am satisfied that the grantee party will comply with the law in this respect.

Major disturbance to land (s 237(c))

[62] The Full Federal Court has recently confirmed that the predictive approach also applies to the issue of major disturbance to land (*Little & Others v Oriole Resources Pty Ltd,* [2005] FCAFC 243 (5 December 2005) at [41]-[51].

[63] With respect to the meaning of major disturbance the Tribunal applies the law as enunciated by the Full Federal Court in *Dann v Western Australia* [1997] FCA 332; (1997) 74 FCR 391 and in *Little* (*Full Federal Court*) at [52]-[57]. The Tribunal must consider whether major disturbance is likely to occur (in the sense that there is a real risk of it) from the view point of the entire Australian country, including the Aboriginal community, as well as taking into account the concerns of the native title party.

[64] The contentions and evidence of the native title party directed to this issue are limited. Firstly, it is said that the rights conferred by an exploration licence authorise major disturbance of ground. The authority cited is *Western Australia v Ward* (1996) 70 FCR 265, the decision of Lee J which as explained above is no longer applicable since the 1998 amendments to the Act. Secondly, the native title party contends that having regard to the evidence reflecting the native title party's perspective on the effect of exploration activity in relation to s 237(a) and s 237(b) there is a real risk that the grant will result in a major disturbance to land or water. Apart from concerns about interference with community and social activities and sites of significance the native title party (Slim Parker affidavit) says that exploration usually disturbs large areas of country through the clearing of grid lines, drilling of holes and grading of access tracks. The access tracks open up the area to the public and it is not uncommon to see them used by the public, other miners and tourist. Mr Parker says it is hurtful when country is disturbed in this way and as a consequence it is more difficult to find bush tucker and bush medicines.

[65] The Tribunal has always had regard to the overall circumstances of each case including in particular the locality in which the exploration will take place as well as the remedial regulatory regime in place. It will consider whether there are any special topographical, geological or environmental factors which would lead members of the Australian community generally (as defined above) to think that exploration activities would result in any major disturbance to land. In most cases the Tribunal has held that exploration activity does not cause major disturbance to land or create rights whose exercise is likely to do so but there have been exceptions (*Champion* at [87] and the cases cited therein).

[66] In making a finding on this point I have had regard to the fact that there are no Aboriginal communities in the vicinity; most of the proposed licence area is over pastoral lease where ground disturbance has already been carried out; and there is extensive history of mining and exploration in the vicinity. There is no evidence that there will not be compliance with the Government party's regulatory regime governing exploration activities and the conditions imposed on the exploration licence dealing with ground disturbing activities, including requirement for rehabilitation of the land (esp. standard conditions 1-4 and the endorsement in relation to the *Environmental Protection Act* and *Environmental Protection (Clearing of Native Vegetation) Regulations*). With respect to the Standard Condition 2, I note that an additional requirement has been added to this condition compared with that considered in *Walley* (at [34]). The backfilling and rehabilitation (including for access tracks) must now be carried out no later than six months after excavation unless otherwise approved by the Environmental Officer, DoIR. I can accept that exploration activity involving significant ground disturbance over the Barimunya site would be of great concern to the native title party. While they and the Australian community would see this as a major disturbance, for the reasons explained above, I do not think interference with the site is likely to occur. Taking all these factors into account including the evidence of concern from the native title party I find that there is not likely to be major disturbance to land in this case.

Determination

[67] The determination of the Tribunal is that the grant of exploration licence E47/1385 to Derek Noel Ammon is an act attracting the expedited procedure.

Hon C J Sumner
Deputy President
2 June 2006