JURISDICTION	:	MINING WARDEN
TITLE OF COURT	:	OPEN COURT
LOCATION	:	PERTH
CITATION	:	MINERALOGY PTY LTD -v- KURUMA MARTHUDUNERA NATIVE TITLE CLAIMANTS [2008] WAMW 3
CORAM	:	CALDER M
HEARD	:	5 & 6 JULY 2007
DELIVERED	:	29 MAY 2008
FILE NO/S	:	APPLICATION FOR GENERAL PURPOSE LEASE 8/63
TENEMENT NO/S	:	GPLA8/63
BETWEEN	:	MINERALOGY PTY LTD (Applicant) and KURUMA MARTHUDUNENRA NATIVE TITLE CLAIMANTS (Objectors)

Catchwords:

ENVIRONMENT - Objection to grant of tenement
GENERAL PURPOSE LEASE - Objection to application for grant - Environmental
GENERAL PURPOSE LEASE - Objection to application for grant - Native title
GENERAL PURPOSE LEASE - Objection to application for grant - Public interest

MARKING OUT - Permit to enter - Native title claim
NATIVE TITLE - Objection to grant of tenement - General purpose lease
NATIVE TITLE - Objection to grant of tenement - Permit to enter
NATIVE TITLE - Objection to grant of tenement - Private land - Native title claim
OBJECTION - To grant of tenement - Environmental
OBJECTION - To grant of tenement - General purpose lease - Exceeding 10 hectares
OBJECTION - To grant of tenement - Native title claim
OBJECTION - To grant of tenement - Permit to enter
OBJECTION - To grant of tenement - Public interest
OBJECTION - To grant of tenement - Private land
PERMIT TO ENTER - Native title claim
PRIVATE LAND - Native title claim
PUBLIC INTEREST - Grant of tenement - Objection to - Native title

Legislation:

Mining Act 1978 (WA), s 29, s 74(1)(ca), s75(6), s 86(1), s 86(3), s 86(5), s 87(1), 87(2), s 90(2) s 111A
Native Title Act 1993 (Cth), s 24MD(6A)
Racial Discrimination Act 1975 (Cth), s 10
Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA)
Aboriginal Heritage Act 1972 (WA)

Result:

Recommended:

1) *Application for grant of General Purpose Lease be refused.*

2) *If application for General Purpose Lease is granted that specific conditions be imposed in addition to standard conditions.*

Representation:

Counsel:

Applicant : Ms B Singh

Objectors	:	Mr S Wright

Solicitors:

Applicant	:	nil
Objectors	:	Wright Barristers and Solicitor.

Case(s) referred to in judgment(s):

BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2004] WAMW 22
BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2005] WAMW 12
Bromley v Muswellbrook Coal Co Pty Ltd (1973) 129 CLR 342
Hamersley Iron Pty Ltd v Puutu Kurnti Kurrama Pinikura Native Title Claimants [2006] WAMW 7
State of Western Australia v Ward [2002] HCA 28
Western Australia v Ward (2002) 213 CLR 318

CALDER M

WARDEN'S REPORT AND RECOMMENDATION TO THE MINISTER: GPLA8/63: SS 90 & 75 *MINING ACT 1978* (WA)

THE PROCEEDINGS

The Application

1 Mineralogy Pty Ltd ("the Applicant") has applied for the grant of a general purpose lease ("GPLA8/63") over an area of 107.05 square kilometres (10,705 hectares). The purposes for which GPLA8/63 is sought are set out in an attachment to the application, namely:

> "*(a) General Purpose Lease for infrastructure facility, including any of the following:*
>
> *(1) a road, railway, bridge or other transport facility;*
>
> *(2) (deleted)*
>
> *(3) an airport or landing strip;*
>
> *(4) an electricity generation, transmission or distribution facility;*
>
> *(5) a storage distribution or gathering or other transmission facility for:*
>
> *oil or gas; or*
>
> *derivatives of oil or gas;*
>
> *(6) a storage or transportation facility for coal, any other material or any mineral concentrate;*
>
> *(7) a dam, pipeline, channel or other water management, distribution or reticulation facility;*
>
> *(8) a cable, antenna, tower or other communication facility;*
>
> *(9) (deleted).*"

2 The Applicant, by letter dated 22 January 2007 and entitled "***Mining Statement to Support the Application for GPL8/63*** " addressed to the Director, Mineral and Title Services Division, DOIR, in brief detail outlined its planned mining operations on mining leases 8/126 to 8/130 in connection with which GPLA8/63 has been applied for. It is said in the letter, *inter alia*, that the Applicant's current conceptual mine design uses the area to the west of the ore body on its mining leases to provide for the dumping of rock waste, however, the Fortescue River provides a limit to the development in that direction.

3 It is said that plant, tailings storage and other associated infrastructure necessary to support the mining operations are proposed to the east of the ore body, that process plants will be accommodated within existing mining lease 8/126 and that tailings storage, water storage and mineral storage will be accommodated within GPLA8/63 which will provide sufficient area for the current development and future expansion of the infrastructure necessary to exploit the Applicant's magnetite deposit. "Project Infrastructure" is described as being constituted by:

"*Pit*	*7.3 square kilometres*
Waste dumps	*12 square kilometres*
Mineral storage	*17 square kilometres*
Tailings storage	*37.7 square kilometres*
Processing plant	*2.7 square kilometres*
Total	*76.7 square kilometres*"

4 Attached to the letter of 22 January is a plan described thereon as the "general infrastructure layout plan ("the Layout Plan")". The Layout Plan includes the boundaries of the ground applied for and within those boundaries shows locations for a tailings dam and water management and distribution and reticulation facility, mineral storage facility, a processing plant which is partly within the ground applied for, an aircraft landing facility, a road and a pipeline with the pipeline being joined to the Dampier to Bunbury gas pipeline and running in an east to west direction across the middle of the ground applied for. It appears that the ground required for the pipeline may be the subject of either a granted general purpose lease 8/55 or an application for a general purpose lease. Four separate locations are shown for the combined category of "tailings dam, water management, distribution and reticulation facilities." Two separate

mineral storage facilities are shown. An access road from North West Coastal Highway is also depicted running through the southernmost portion of the ground applied for.

The Applicant's Particulars

5 In answer to a request from the Objectors for further and better particulars as to infrastructure to be constructed on the ground applied for, the Applicant, under the heading "***Potential Infrastructure Facilities***", has simply repeated the list of infrastructure categories that had attached to its application. Reference is made in the particulars to the letter of 22 January 2007 that I have previously referred to. It is said that in that letter and in the list that accompanied the application for the grant of the tenement and in a number of documents that are said to be available on the Website of the Environmental Protection Authority in connection with the Applicant's iron ore project, further details of the proposed infrastructure facilities are provided. In its further particulars the Applicant says that it is unable to detail all of the particulars of the layout of the proposed transport infrastructure as that will depend, *inter alia*, on the grant of GPLA8/63.

6 In relation to the airport or landing strip, the Applicant merely refers to the Layout Plan that accompanied the letter of 22 January 2007. Concerning "electricity generation, transmission or distribution facility", it is simply said that it is proposed that a gas-fired power station will be used to generate power for the processing plant and mine and that the gas will be sourced from the Dampier to Bunbury gas pipeline which runs through the southern end of the ground applied for. In relation to storage of oil or gas, it is simply said that fuel will be required for a variety of purposes associated with the project. In relation to storage of mineral, it is said that it will be necessary to temporarily stockpile and store iron ore on the ground applied for before it is exported. It is said that provision has been made within the proposed GPL8/63 for tailings dams, water management, distribution and reticulation facilities and reference is made to the Layout Plan. It is further said that, as is depicted in the Layout Plan, it is proposed to construct a communications facility near the southern border of the ground applied for.

7 A request was also made for particulars of claimed consultation with the Objectors. In answer, the Applicant's particulars make reference to an annexed extract from the "Iron Ore Mine Downsteam Processing, Western Australia Public Environmental Review" ("the PER") prepared by Halpern Glick Maunsell Pty Ltd of December 2000 in which reference is

made to consultation conducted by the Applicant. In that document it is claimed that discussions had been held with the Aboriginal Legal Service("ALS") representing the Objectors. It is also said that during an ethnographic study commissioned by Austeel in February 2000 discussions were held with Patricia Cooper, Wilfred Hicks and Kane Hicks who, it is claimed, are some of the claimants for the native title applications in the area. It is also said in the same document that in October 1996 meetings had been held between Austeel and the Objectors in Roebourne to provide the Objectors with an understanding of the company's plans and to negotiate an agreement.

8 It is said that Austeel drafted an agreement but that the Aboriginal Legal Service failed to respond on behalf of the Objectors and no agreement was entered into. It further said that meetings and discussions with representatives of the Objectors took place in February and March 2000. The document also says that, to the date of the document, the Objectors' group had not identified any sites of significance pursuant to s 15 of the *Aboriginal Heritage Act* and no sites have been identified which impact on the project development plans. In giving consideration to the PER Document, it must be borne in mind that GPLA8/63 was lodged over six years after the publication of the PER. In addition to the reference to the aforesaid PER, the Applicant also made reference to a letter from the Department of Indigenous Affairs ("DIA") to the Applicant dated 13 September 2006 in which it is said, *inter alia*:

9 "*Mineralogy Pty Ltd has consulted widely in the Pilbara regarding the project and has stated its intention to continue this consultation to avoid and/or minimise developmental impacts on heritage*," and where it is further said, "... *This set of actions and intents demonstrates a responsible approach to heritage protection*."

10 In its written response to the Applicant's particulars, the Objectors say that it is unclear what is proposed to be built and where the proposed facilities would be located on the ground applied for. It is claimed that the breadth and intensity of the proposed infrastructure will be likely to have a grave impact on the land, on flora and fauna, on sites of significance, and on lifestyles and cultural heritage of the Objectors. It is further said that the cultural importance of the land includes, but is not limited to, the large number of registered Aboriginal sites that are present.

11 The Objectors deny that the particulars relating to consultation disclose a basis for the Applicant's claim to have consulted the first

Objector and says that the Applicant has been unwilling to engage in general consultation with the Objectors regarding the application.

12 The Objectors say that they do not accept that all necessary requirements under the Act, including but not limited to s 87, have been complied with. Section 87 of the Act says that the purpose or purposes for which a general purpose lease is granted are to be specified in the lease and that the lease entitles the grantee to exclusive occupation of the land for one or more of specified purposes, namely, erection, placement and operation of machinery in connection with mining operations, depositing or treating minerals or tailings or using the land for any other specified purpose directly connected with mining operations.

FURTHER AND BETTER PARTICULARS OF APPLICATION

13 In February 2007 Mineralogy provided the Objector with further and better particulars that had been requested by the Objector. In relation to "*Potential infrastructure facilities*" the Applicant does nothing more than to reproduce verbatim the definition of "infrastructure facility" contained in the *Native Title Act*. In relation to "*Infrastructure facilities currently contemplated for the Project*", Mineralogy has simply referred to the previously mentioned letter of Mr Strizek to DOIR dated 22 January 2007 with the Layout Plan. Apart from noting that the previously proposed jetty or port infrastructure facility had been removed from the GPL8/63 application pursuant to an application to amend filed by the Applicant on 9 November 2006 and stating, without providing any detail apart from a reference to the contents and attachment to the previously mentioned letter of Mr Strizek, the Applicant merely repeats that all other facilities are proposed.

14 In response to a request for particulars concerning “consultation”, Mineralogy has annexed to its further and better particulars extracts from the PER and the previously mentioned letter from DIA in which it is stated that Mineralogy has consulted widely regarding the project and demonstrated a responsible approach to heritage protection. The extract from the PER contains item 14.3 which was the subject of comment by Ms Southalan in her responsive submissions to the PER. Paragraph 14.3 of the PER says that in February 2000 Austeel commissioned an ethnographic study of the project area by Mr O'Connor. It says that the study dealt with Aboriginal sites as listed in the Aboriginal Affairs Department records, previously relevant ethnographic reports, relevant

sections of the Native Title Register, history of local Aboriginal politics relevant to the project and preliminary discussions with selected relevant Aboriginal people. It says that discussions have been held with representatives of some of the major claimant groups, including, *inter alia*, "*... the Kuruma Marthudunera People (Aboriginal Legal Service)*". It says that during the study discussions were held with Patricia Cooper, Wilfred Hicks and Cane Hicks who were some of the claimants for native title applications in the area. It has then said that in addition Austeel has held ongoing discussions with major Aboriginal groups in the area but does not name them.

15 The PER then refers to a meeting held in October 1996 between the Chairman of Austeel and the Kuruma Marthudunera group in Roebourne which, it is said, led to a draft agreement being drawn up with Austeel's holding company Mineralogy covering heritage and other issues. It is said that further negotiations and meetings were held with the representatives of the Kuruma Marthudunera in 1997 *"but that despite agreement from the groups attending the meetings ALS failed to respond in any meanful [sic meaningful] way to the document lodged by Mineralogy and no agreement was entered into".* Reference is then made to meetings in February and March 2000 with representatives of the Kuruma Marthudunera group and it is then said that to date the group has not identified any sites of significance pursuant to s 15 of the *Aboriginal Heritage Act* and no sites have been identified which impact on the project development plans. It is also said that another native title claimant group, the Yaburara Marthudunera People, had also failed to identify any Aboriginal sites that impact upon the Austeel project.

16 Paragraph 14.3 then goes on to state that ethnic and archaeological surveys had been carried out in advance of the installation of the Perth to Dampier gas pipeline and on behalf of Telstra "*... in the study area ...*" and on behalf of Main Roads Western Australia. No dates are provided for those surveys. No results of those surveys are indicated. It is then said that information from the Aboriginal Sites Register of the Aboriginal Affairs Department identified 34 sites that had previously been recorded, none of which occurred in the areas that will be impacted by the project. Paragraph 14 states that Austeel recognises its legal responsibilities under the *Aboriginal Heritage Act* to consult with appropriate representatives of Aboriginal communities and to conduct appropriate ethnographic and archaeological surveys and that Austeel commits to undertaking an appropriate level of consultation and investigation prior to the EPA finalising its assessment.

THE OBJECTION

The objectors are the Kuruma Marthudurara Native Title Claimants. The ground of objections are:

17 *"The objectors are registered native title applicants over the land on which the Applicant seeks to have the proposed tenement granted.*

18 The objectors believe that activities that might be allowed under the proposed tenement could have an adverse impact upon the exercise of native title rights, cultural heritage (including sites of significance) and lifestyles of the objectors. Work and activity allowed under the licence could also affect the environment and flora and fauna in the area, which would impact on the objectors, and the granting of the tenement would be contrary to the public interest.

19 The objectors do not accept that all necessary requirements under the Mining Act 1978 and the Mining Regulations 1981 have been complies with by the Applicant."

THE HEARING

20 It was agreed by the parties, and orders were made to the effect, that all of the parties were to file and serve affidavits of the evidence-in-chief of their intended witnesses and that, subject to any further order by the Warden, no additional evidence-in-chief would be received from such witnesses. The parties both filed and served lists indicating, as directed, those witnesses required to be in attendance at the hearing for cross-examination.

Evidence on Behalf of the Applicant

21 **Brett Smail** was not called to give evidence but his affidavit was lodged in connection with GPLA8/63 and I have taken its contents into account. In the affidavit, sworn on 20 March 2007, he says that he is a survey technician employed by Whelans (WA) Pty Ltd and that on 26 and 27 September 2006, in accordance with the requirements of the Act and Regulations, he physically marked out the ground applied for. He has sworn that all corners of the ground applied for were positioned using a differential global positioning system. Attached to his affidavit is a document entitled "Field Instruction Sheet" which includes specific

directions as to installation of the corner posts, trenching, attachment of the Form 20 and the height that the posts must be above the ground level. Those instructions are consistent with the Act and Regulations. I find that he followed those instructions. The contents of the affidavit have not been in any way qualified by the Applicant or challenged by the Objectors. I find that the ground applied for for purposes of GPLA8/63 was marked out in accordance with the requirements of the Act and Regulations in respect of the physical marking out of the ground applied for.

22 **Wayne Peter Stewart**, a consulting surveyor employed by Whelans (WA) Pty Ltd, swore an affidavit dated 20 March 2007 which was also lodged with the Registrar in connection with GPLA8/63. He did not give oral evidence. In his affidavit he says, *inter alia*, that to the best of his knowledge, information and belief the application for GPLA8/63 complies with the relevant marking-out provisions of the Act and Regulations, including s 105 of the Act. That is a broad statement of his understanding of the law and is not evidence that can be given by this witness.

23 Mr Stewart annexed to his affidavit a copy of an affidavit of compliance sworn on 24 October 2006 which was provided to DOIR in support of the application for GPLA8/63. In that affidavit he swears that to the best of his knowledge, information and belief the Form 21 was affixed to the datum post. The application was advertised as required. A copy of the Form 21 was served on Mineralogy Pty Ltd as the holder of miscellaneous licence 8/20 and a copy of the Form 21 was served on the pastoral leaseholder and on native title claimants or holders. The contents of his affidavit are not challenged insofar as they relate to actions taken in respect of the application and, in that regard, I find that those actions were completed as and when described by him.

24 **Vimal Sharma** has sworn three affidavits that are relevant to the proceedings. Mr Sharma is the managing director of the Applicant and has been employed by the Applicant since 1999. He has access to the Applicant's relevant records. He was previously, from 1999 to 2004, general manager, Western Australia, of Austeel Pty Ltd ("Austeel") and has access to Austeel's relevant records. The Applicant is the parent company of Austeel. In his affidavit of 22 March 2007 (pars 10 to 13) he makes statements of law concerning the public interest, the validity of some of the grounds of objection and his understanding of rights granted under the *Native Title Act* and *Aboriginal Heritage Act*. Those are not matters that may appropriately be contained in such an affidavit. I do not

take his opinions into account. Mr Sharma states (par 14) that the Applicant commissioned an ethnographic survey that was completed in June 2001 by Austeel and an archaeological survey completed in May 2001 in the area.

25 Mr Sharma says in his affidavit that over the previous five years the Applicant had been in constant consultation with various native title groups in the area, including the Objectors. He annexed to his affidavit the previously mentioned letter dated 13 September 2006 from the DIA. The letter concerns the lodgment by the Applicant of an Aboriginal Heritage Management Plan with that Department. It is said in the letter that the plan is an adequate approach to the management of the heritage values of the Cape Preston development area. In the next paragraph the DIA letter says that Mineralogy "…*has consulted widely in the Pilbara regarding the project..".* I proceed upon the basis that I infer that all of that is hearsay on the part of DIA and that it simply repeats what I can only presume that DIA had been told by the Applicant concerning its consultations.

26 The same may self-evidently be said of the letter, where it then says that Mineralogy has "*stated its intention to continue consultation"* of the next paragraph in which it is said that Mineralogy "*undertakes to comply with the provisions of the Aboriginal Heritage Act 1972"*, even if the letter can be taken as evidence that such an undertaking was given, it cannot be taken as evidence before me that there will be such compliance.

27 The letter also says that the project area will be subject to an agreed Aboriginal Sites Management Plan to be in effect during the life of the mining operations. In the second-last paragraph the letter states that the actions and intents described therein demonstrates a responsible approach to heritage protection and that, accordingly, DIA has no issue of concern with the project proposal.

28 No copies of and none of the details, in general or in particular, of either the Aboriginal Heritage Management Plan or any agreed Aboriginal Sites Management Plan, are before me. None of the communications by means of which DIA was provided with the advice and information upon which the contents of the letter are based are before me. In his affidavit Mr Sharma has said that he believes that the Applicant has and will continue to comply with whatever obligations it may have under the *Environmental Protection Act*.

29 As to the purpose for which GPLA8/63 is required by the Applicant, Mr Sharma says that it relates to the development of a major mining project relating to mining leases 8/118 to 130 inclusive of which the Applicant is the registered holder. He says that the project cannot proceed without proper infrastructure facilities and that is why the ground applied for is required. He also annexed to his affidavit several newspaper articles concerning proposed developments on the mining leases held by the Applicant together with copies of ASX announcements and press releases concerning proposed developments on the mining tenements.

30 In a second affidavit sworn 18 June 2007 Mr Sharma addresses matters that are dealt with in the affidavits sworn and filed on behalf of the Objectors. Concerning the statement of Ms Southalan that the Applicant has not been in constant consultation with the Objectors over the past five years, Mr Sharma says that Ms Southalan is wrong. He says that it is his understanding and belief that consultation is not a requirement under the *Mining Act* but that the Applicant has, nevertheless, consulted with the Objectors and is committed to establishing and maintaining a good relationship with them. He cites the letter to the Applicant from DIA of 13 September 2006 to which I have previously made reference "*as clear evidence of the adequacy of the Applicant's consultations*". That letter is not clear evidence of there having been consultation, adequate or otherwise.

31 Mr Sharma says that the Aboriginal Heritage Management Plan referred to in that letter is a confidential document. He states that the Applicant has and will continue to comply with its obligations under the *Native Title Act*, the *Aboriginal Heritage Act* and the *Environmental Protection Act*, including any obligations that it may have to consult with the Objectors. He expresses the belief that because Ms Southalan has not been employed continuously for the previous five years by PNTS, she could not have been exposed to the Applicant's "*constant consultation*" for any more than a total of less than one of those five years. He also expresses the belief that Ms Southalan has not been fully appraised of the Applicant's consultations with the Objectors and says that he, however, has during those five years been either directly or indirectly involved with the Applicant's ongoing consultations and contact with numerous PNTS representatives in the Karratha and Perth offices and he mentions four such officers by name.

32 Mr Sharma says in the affidavit that that the Applicant had recently provided a copy of a confidential report that related to other tenements and offered to negotiate a heritage agreement with the Objectors in

exchange for withdrawal of their objection to GPLA8/63 and certain other tenements. He annexed a copy of a standard heritage agreement to his affidavit and observes that such an agreement would involve consultation with the Objectors. He said that the offer was put to the Objectors' legal representatives by the Applicant at a meeting on 11 June 2007 and the offer was to expire on 19 June 2007, but that as of the date of his affidavit (18 June 2007) no response had been received.

33 The proposed agreement contains express provisions relating to exchange of information between the Applicant and the objectors concerning activities to be carried out by the Applicant, for consultation to determine whether a heritage survey is required (unless relevant circumstances are dealt with in the proposed agreement), for the providing of the results of any heritage survey (as a draft and in a final form) to the Objectors, for there to be no extinguishment of native title arising from the agreement, for consultation in respect of any notices given under s 18 of the Aboriginal Heritage Act and for consultation in respect of any such notices and for the withdrawal of any objections by the Objectors to the grant of any tenement within seven days after the date of the agreement with the proviso that no further objections may be made.

34 Concerning the PER, Mr Sharma says that Austeel responded in detail to the Objector's PER submissions over five years ago and annexed to his affidavit are what he says are copies of the relevant pages from Austeel's response to the public submissions. The response is dated March 2002. In its responses to those submissions that have been annexed to his affidavit Austeel has said that full ethnographic and archaeological surveys had been completed and that four Aboriginal groups, including the Objectors, had participated in the heritage surveys that had been undertaken and completed. It is said that Austeel had consulted with the wider Aboriginal community in the Pilbara and had sought input from each and every person listed on relevant native title claims over the project area and sought input from every listed Aboriginal organisation in the Pilbara.

35 In response to the objector’s submission 139, in which response it is stated that the Objectors are willing to assist regarding heritage matters but must be involved in the choice of a suitable heritage consultant and were not prepared to accept or endorse any heritage survey report produced by consultants appointed by Austeel, namely, Mr O'Connor and Mr Quartermaine, Austeel said that it had decided that independent archaeological and ethnographic consultants should be appointed to conduct the surveys and that, initially, the appointment of

Mr Quartermaine and Mr O'Connor had been acceptable to three of the four Aboriginal claimant groups representing 93 per cent of all interested Aboriginal people.

36 Austeel said that its two consultants were suitably qualified and experienced to undertake the survey. It said that Austeel made considerable efforts to include the Objectors in the survey but found that the persistence of the Pilbara Native Title Service ("the PNTS") in objecting to Austeel's consultants, in preference to their own consultants, unacceptable and that that represented a conflict of interest. It concludes the response by stating that Austeel is pleased to report that representatives from all of the Aboriginal groups have participated in the surveys. Austeel confirmed that it had refused to release to PNTS a copy of the preliminary ethnographic report from Austeel because of the nature of the information in it and the circumstances in which it was obtained.

37 Mr Sharma notes that, in her affidavit, Ms Southalan makes reference to an application that the Applicant has made under s 18 of the *Aboriginal Heritage Act* and says that attempts to obtain a coy of the application and reports lodged in support of it from DIA had so far been unsuccessful and that the Applicant had not discussed the application with PNTS or the Objectors. In response Mr Sharma has said that as s 18 applications often involve confidential and culturally sensitive information, he does not believe that it is appropriate to provide information to the Objectors in relation to such matters.

38 Mr Sharma gave oral evidence at the hearing before me. He produced a further affidavit. In accordance with directions given by me, to which both parties consented, Mr Sharma gave no further evidence-in-chief. During cross-examination by counsel for the Objectors he said that 13 tenements, namely, mining leases 8/118 to 130 inclusive were all held by the Applicant. He said that the combined tenements constituted three separate projects under the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) which, he said, permits multiple projects to be undertaken by the Applicant.

39 He said that in respect of mining leases 8/123 to 125 an agreement had been entered into between the Applicant and companies associated with Citic Pacific Ltd. He called that the "China Project". He said that Mineralogy also holds three miscellaneous licences, 8/264 to 266 inclusive, together with general purpose lease 8/54, all of which are to be used for infrastructure related to the China Project. He said that there were, in all, three projects connected with M8/118to 130 inclusive but that

M8/264 to 266 and GPL8/63 8/54 were to be used only for one project, namely, the China Project. He said that another party, whom he named as Australasian Resources, had an agreement with Mineralogy and, pursuant to that agreement, had a right to mine on M8/126 to 8/130 which are to the south of M8/123 to 125.

40 In relation to M8/118 to 122, located immediately to the north of M8/123 to 125, Mr Sharma said that there were currently no rights that had been granted to any other party to mine on those leases. He said that it is with M8/126 to 130 that GLPA 8/63 is connected. He said that the ground applied for is intended to contain infrastructure in relation to the Australasian Resources Project. He said that it was planned at present that that project would produce up to one billion tonnes of ore from, potentially, up to six separate mines. In his affidavit of 22 March 2007, which was tendered in evidence, Mr Sharma had said that GPLA8/63 "... *should be granted on the basis that it is in the public interest that the assessed six billion-odd tonnes of magnetite ore located on the Applicant's granted mining leases adjacent to this tenement be able to be developed. The purpose of this General Purpose Lease is to facilitate infrastructure necessary for projects to develop the six billion tonnes of ore already assessed in these mining leases.*"

41 During cross-examination he conceded that in an announcement to the ASX dated 30 March 2007 Australasian Resources had said that there were ore reserves estimated at 547,000,000 tonnes, that there was an indicated resource of 557,000,000 tonnes and an inferred resource of 551,000,000 tonnes. He also agreed that in an ASX announcement dated 29 May 2007 Australasian Resources had upgraded the indicated resource estimate to 744,000,000 tonnes but that the ore reserve estimate was still 547,000,000 tonnes. It is not clear from either the affidavits of Mr Sharma or his evidence how he arrived at an "assessed" six billion tonnes of ore.

42 During re-examination Mr Sharma agreed with counsel for Mineralogy that Mineralogy held data that related to resources within all of the mining leases M8/118 to 130, being data that may not have been assessed at JORC level and that there may, within all of those tenements, be more resources than what has been announced to the ASX. He was then asked to indicate, based on his knowledge, and noting that there were assessments that were not JORC assessments, what his assessment was of the number of billions of tonnes of ore that Mineralogy, as a group, owns within those mining leases or about those mining leases. His answer was "18 billion tonnes."

43 He was then referred to a letter of Mr Strizek, director of geology and exploration for Mineralogy that being the previously mentioned letter dated 22 January 2007 to DOIR which is referred to by the applicant in its particulars. In the letter Mr Strizek says that M8/126 to 130 have the "potential" to contain around six billion tonnes of magnetite ore. He notes that the then current JORC resource estimate for those tenements is "*some 1.1 Bt*". Mr Strizek then says that the ore mined from the tenements will undergo a beneficiation process and that studies indicated for every tonne of ore mined there would be around two and half tonnes of tailings produced. In re-examination Mr Sharma was referred to that ratio of ore mined to tailings produced and said that, based on "non-JORC assessments" of 18 billions tonnes of ore, 52 billion tonnes of tailings would be produced.

44 I am not satisfied, on the basis of the evidence before me, that M8/126 to 130 have been in any reliable way "estimated" to contain six billion tonnes of ore, let alone six billion tonnes of economically mineable ore. During cross-examination, when asked whether it is correct that no final investment decision in the project connected with M8/126 to 130 had been made by Shougang Steel, which had entered into a joint-venture agreement with Australasian Resources, Mr Sharma did not give a direct answer. What he said was that Shougang had set aside $3,000,000 to conduct a feasibility study, that Shougang was a serious partner, that Shougang had the second largest steel mining (*sic*) in China and said that that was all he could say. He said that counsel should go to a Web site to have an understanding of their involvement. On the basis of Mr Sharma's evidence it appears that, as at the date of hearing, Shougang had, at best, committed itself to no more than contributing to a feasibility study in relation to M8/126 to 130. Given the nature and proposed size of the development that Mr Sharma was referring to, it is quite likely that it is only a pre-feasibility study that is Shougang may have committed to.

45 In cross-examination Mr Sharma was referred by counsel to the second-last paragraph of the letter to Mr Strizek of 22 January 2007 in which it is said that Mineralogy had commissioned a review of the project requirements for the entire magnetite deposit within those five tenements. A drawing of the planned project was attached to the letter (the Layout Plan). Mr Strizek said that the Layout Plan identifies the major infrastructure believed to be necessary for the successful operation of the project. Mr Sharma agreed that the estimates of land required for the different infrastructure facilities and the plan that accompanied the letter were based upon a potential of six billion tonnes of ore being mined from those tenements.

46 He later said in cross-examination, however, that the ground applied for in GPLA8/63 would be used for infrastructure facilities connected with mining operations on M8/122 to 125, namely, the China Project to be undertaken by Citic Pacific. I note that that is consistent with par 19 of his affidavit of 22 March 2007 in which he said that GPLA8/63 relates to the development of M8/118 to 130 inclusive. He did concede, however, that even if GPLA8/63 was not granted, the Citic Pacific Project would go ahead in any event. He qualified that, however, by saying that the Citic Pacific Project did require the tailings facilities that were proposed on the ground applied for in GPLA8/63. Mr Sharma was very vague in his evidence about what infrastructure facilities were required for the Citic Pacific Project which, it had been announced, would be proceeding. He was not a reliable witness in that regard.

47 He did agree that on the Layout Plan that accompanied Mr Strizek's letter of 22 January 2007 an area designated "tailings dam" is located to the east and north-east of M8/123 to 125 and he said that Citic Pacific would utilise that area for tailings dam purposes in connection with mining operations, the commencement of which had been announced. His attention was also drawn to GPL8/54 shown on Mr Strizek's Layout Plan directly to the east of M8/123. He said that a tailings dam is located on that tenement and that it would be used for the Citic Pacific Project. There are four tailings dams shown on the Layout Plan.

48 Mr Sharma said that he was unable to say what area Citic Pacific required for tailings. He said, however, that Citic Pacific did require some tailings facilities on the land the subject of GPLA8/63. He was very vague about what Citic Pacific's requirements were in connection with tailings dams. He suggested that one of the tailings dams shown in the northern part of the ground the subject of GPLA8/63 would be required for "additional projects" beyond the project that Citic Pacific had already announced that it was about to commence, namely, to mine one billion tonnes of ore. Mr Sharma was very vague as to why Mineralogy needed the 107 square kilometres of land the subject of GLPA 8/63. When asked about that, his answer consisted of little more than generalisations.

49 In par 14 of his affidavit of 22 March 2007 Mr Sharma says that Mineralogy has already commissioned an ethnographic survey that was completed by Austeel in June 2001. He was cross-examined about that document. It was not annexed to his affidavit, however, a copy was presented to him during cross-examination by counsel for the Objector. He agreed that four water pools identified in part 3.6 of the survey were

within the area of GPLA8/63. He said that he was aware of those pools. He said that further surveys had been undertaken and were continuing to be undertaken in relation to the Citic Pacific Project. He acknowledged that there was a need for further surveys to be undertaken on the area of GPLA8/63. He said, however, that Mineralogy believed that the next time there would be consultation would be when applications are made pursuant to s 18 of the *Aboriginal Heritage Act*. Section 18 requires the consent of the Minister to be given to a use of land which would be likely to result in a breach of s 17 of the Act. Section 17 of the Act says that any person who excavates, destroys, damages, conceals or in any way alters any Aboriginal site or deals with in a manner not sanctioned or assumes possession, custody or control of any object on or under an Aboriginal site commits an offence unless the person is acting with the authorisation of the Registrar or the consent of the Minister.

50 In par 5(f) of his affidavit of 18 June 2007 Mr Sharma says that Mineralogy has provided a copy of a confidential report and offered to negotiated a heritage agreement with the Objectors in exchange for the withdrawal of their objection to the proposed tenement and certain other tenements. During cross-examination, when asked to confirm that the offer to be negotiated was on the basis that the objection to GPLA8/63 be withdrawn, he said, "*No, that wasn't my understanding.*" He said that his understanding, based upon advice from DOIR, was that if Mineralogy executed a heritage agreement with the Objectors, the Objectors would withdraw their objection.

51 In that same paragraph of his affidavit Mr Sharma makes reference to a "Standard Heritage Agreement" which he said Mineralogy had been given by DOIR to send to Aboriginal groups. He agreed that that standard agreement, a copy of which is annexed to his affidavit, had been developed for exploration activities. When he was asked if he agreed that it would not be an appropriate document in relation to the development of mining projects on GPLA8/63, he, in my opinion, avoided answering the question by simply saying that that had not been brought to the attention of Mineralogy at that stage.

52 Also annexed to Mr Sharma's affidavit of 18 June 2007 is an extract from Mineralogy's response to public submissions in relation to the PER. The annexed extract includes a response to public submission number 137 wherein the Aboriginal Heritage Commission referred Austeel to the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 and requested that Austeel comment about Austeel giving consideration to strategies to minimise the risk of applications

being lodged under that Act for protection of significant Aboriginal areas. In its response, Austeel said that it has completed archaeological and ethnographic surveys to identify whether any heritage sites occur within the project area, that the results of those surveys have been provided to relevant authorities and that correct procedures will be adopted to obtain permission to disturb any sites that cannot be avoided.

53 During cross-examination Mr Sharma was asked whether the answer given by Austeel, viewed in the light of the nature of the ethnographic report that was produced in these proceedings by the Objectors, was not misleading in the sense that full surveys had not been undertaken. Mr Sharma said that he did not see that as an issue as the survey that had been conducted on behalf of Austeel was to take the project from exploration and lead into construction and that then it would be necessary to "*... follow the different stages like section 18 applications and others where additional surveys will be required*".

54 Mr Sharma was also referred in cross-examination to an extract from the register of Aboriginal sites maintained by DIA. He agreed that there were 12 registered sites within the area of GLPA 8/63. He said that Mineralogy did not dispute that there are sites within the ground applied for and acknowledged that if development were to take place, there were statutory requirements and processes that needed to be complied with. It is also said that no site locations have ever been identified to Austeel or to Mineralogy by any of the native title claimant groups or by their representatives.

55 Mr Sharma's evidence was generally not convincing and in many respects he was an unreliable witness.

Evidence on Behalf of the Objector

56 The Objector relied upon three witnesses, namely, Mr Neil Finlay, Ms Anne Wally, both of whom appeared in person, and Ms Louise Southalan whose evidence was received by way of affidavit made on 10 May 2007. Mr Finlay and Ms Wally were both cross-examined. Counsel for Mineralogy did not require Ms Southalan to be present for cross-examination and, accordingly, Ms Southalan did not appear at the hearing.

57 **Mr Finlay** made an affidavit dated 10 May 2007 in connection with these proceedings. That affidavit was tendered as his evidence-in-chief. Mr Finlay was called by the Objectors and formally identified himself and

his affidavit. He said that when he made the affidavit, as stated therein, he was chairman of Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation. However, at the time of his appearance as a witness in these proceedings he no longer occupied that position. He also said, in relation to par 36 of his affidavit, in which he says that he had been to the area in and around the ground applied for about four or five times in the last 12 months, that the period of 12 months is incorrect and that the period during which he had been to the area had "*... probably been a bit longer than that*". Mr Finlay said that subject to those two matters what is in his affidavit is true and correct as far as he is aware.

58 Mr Finlay was cross-examined. He said that at the time of hearing he was just a committee member and not a chairman of the Aboriginal Corporation. He was shown a document which he agreed had his signature on it. Counsel for Mineralogy read aloud part of the document, namely: "*Received from Wilfred Hicks consultancy fees of $900 for consultation regarding Austeel development at Balmoral, Cape Preston, and Aboriginal heritage inspection of Austeel leases.*" Counsel for Mineralogy then asked, "So you were participating in that survey?" Mr Finlay said, "Yes." Counsel then said, "Or did you attend that survey?" Mr Finlay again said, "Yes."

59 During re-examination Mr Finlay said that the document that counsel had shown him during cross-examination related to an occasion when he went in a helicopter with Wilfred Hicks and that, as he had explained in his affidavit, he did not then give any information about Aboriginal sites. He said he was not even speaking to Mr Hicks because he knew that Mr Hicks was at the wrong place. He also said that Mr Hicks had been told by two old tribal people who were with them in the helicopter that the country over which they were flying was not Mr Hicks' country and that Mr Hicks was not part of the Marthudunera and Kuruma People.

60 Mr Finlay said that he did not know whether other people who had signed the document that he had been shown during cross-examination had given Wilfred Hicks any information. He said that what had taken place was not a survey where lots of Kuruma Marthudunera People had been involved. He identified two of the people whose names were on the document, namely, Ronald David and Red Alexander, as being his nephews. He said that only one of them, namely, Ronald David, had been with him in the helicopter. He said that Ronald David had not said anything to Wilfred Hicks during the helicopter flight.

61 From the affidavit of Mr Finlay I make the following findings of fact. He is an elder and lawman of the Kuruma Marthudunera People and a member of the Kuruma Marthudunera native title claimant group (Federal Court application WAD 6090/98). He is aware of the location of the ground the subject of GPLA8/63. He is entitled to speak on behalf of his people for that country. He is familiar with the area, having been born nearby and having visited it on many occasions with his family while growing up. The Kuruma Marthudunera group has a process for engaging in discussion with mining companies in connection with the impact of proposed mining tenements and mining operations on native title rights and cultural heritage matters. The process involves working group meetings. The Kuruma Marthudunera authorise members of their community to attend working group meetings with miners. Mr Finlay is a working group member.

62 Matters that require the attention of working group meetings are brought to the group through PNTS. Although the working group has authority to make decisions on most matters, all very important decisions must be made at a Kuruma Marthudunera Community Meeting to which all Kuruma Marthudunera People are invited to attend and in which they may all participate. Neither individual working group members nor individual Kuruma Marthudunera People are permitted to make decisions on behalf of the Kuruma Marthudunera. Under traditional laws and customs of the Kuruma Marthudunera, knowledge about different matters is sometimes held by different people and for that reason participation of working group members in the decision-making process is very important.

63 In February 2000, or shortly thereafter, the Kuruma Marthudunera working group unsuccessfully tried, through the ALS, to arrange a meeting with Mineralogy concerning drilling that was being undertaken on one of Mineralogy's tenements. Mr Finlay believed that Mineralogy had not informed his people about that drilling. He was concerned about damage to Aboriginal sites in the area. He was told by a solicitor that the ALS had been unsuccessful in their attempts to arrange a meeting with Mineralogy.

64 Mr Finlay was informed by the Objectors' legal advisers that Mineralogy claimed that as part of their consultation with the Kuruma Marthudunera they had conducted an Aboriginal heritage survey in June 2001 over their tenements. Mr Finlay knew about this survey and was very concerned about it. He believed at the time that Mineralogy had not used the PNTS to organise the survey as companies wanting to do such surveys normally did. He did not participate in the survey as an

Aboriginal consultant. He did not attend the survey as a representative of his native title group. He went along as an individual because he knew that the people involved in the survey had no right to and could not speak for the country but he was concerned that they would do so.

65 Mr Finlay believed that Wilfred Hicks, who is not one of either the Kuruma or the Marthudunera People, organised the survey. He said that he had an argument with Mr Hicks about whose country they were on when they went to Mardi Station. Other people who were in the group said that that country was not the country of Wilfred Hicks and his brother. It was from Devil Creek at Mardi Station that the helicopter trip previously referred to was undertaken. He believed that Mr Hicks had already flown around the survey area and he wanted Mr Hicks to show him the places that he had been to on the survey. He said that is the reason why he went in the helicopter. As he said in his evidence before me, the helicopter flew over the area where Mineralogy planned to mine but he did not tell Mr Hicks anything about any of the sites around where they flew. No-one asked him anything about whether there were any sites in the area that was flown over. No-one asked him if it was all right to mine there. He said that he did not give Mr Hicks any information about sites because it is not his country.

66 Mr Finlay did not see the heritage survey report, although he expected to have been given the opportunity to make comments on the survey and the survey report to PNTS and to anthropologists engaged by PNTS for the Kuruma Marthudunera group. He did not provide any comments about the survey to any person acting on behalf of Mineralogy.

67 In Mr Finlay's experience, the normal method of consultation by mining companies with Aboriginal groups is to meet with a working group or, if necessary, the whole of the community to outline their plans. If heritage surveys are to be done, then survey teams are chosen by the working group or the whole community group and surveys are done with consultants engaged by or on behalf of those groups and who are acceptable to the groups. It is usual for the survey team to walk around the subject area with a consultant and not just simply fly over it. Survey reports are discussed and approved by the working group or community meetings before being submitted to the mining companies. Mr Finlay's view is that it is vital for the working or community group to inspect and be satisfied about survey reports and decide about what is needed to minimise damage or to decide whether sites are so important that they cannot be altered in any way. It is preferable that surveys are conducted without members of other Aboriginal groups being present because

different groups are reluctant to discuss sites or matters related to sites in the presence of others.

68 Mr Finlay said that if what was done in 2001 is considered by Mineralogy to be an adequate survey, then that raises concerns about the way Mineralogy will work with the Kuruma Marthudunera in the future. Without providing a copy of any decision by the Independent Person pursuant to s 24MD(6B) of the *Native Title Act*, Mr Finlay said that he had been informed by his lawyers that Mineralogy had previously applied for miscellaneous licences 8/22 and 8/23 in the same general area in the past and that the Kuruma Marthudunera People had objected to the grant because there had been no proper consultation with them. He said that his lawyers had informed him that the Independent Person upheld the objection and agreed that there had not been proper consultation. Mr Finlay believes that since that decision Mineralogy has not consulted with his people. I have not seen the decision of the Independent Person.

69 Mr Finlay says that there are Aboriginal sites, including sites of cultural heritage significance to his people within and in the vicinity of GPLA8/63 that are not registered on the Register of Aboriginal Sites and are not the subject of any ethnographic heritage survey report. He says that there are important sites inside the ground applied for and in the surrounding area, including birth places and burial places that are of significance to the Kuruma Marthudunera. He says that there could be many more important sites in the tenement area that he is not personally aware of but where the knowledge is held by other people. Mr Finlay is not sure of exactly where the boundaries of the tenement are and is unable to judge by a map as to what may be in the area. He and his people will need to travel to the area and to go through it in order to be able to recognise and identify any sites that are within the tenement.

70 Mr Finlay is very distressed at the thought of Mineralogy entering his country in what he describes as a disrespectful manner and he believes that all other Kuruma Marthudunera People are similarly very distressed.

71 Concerning the exercise of native title rights, I find that the Kuruma Marthudunera regularly conduct a range of important communal and social activities in and about the ground the subject of GPLA8/63, including hunting, camping, collecting traditional food and medicine and wild tobacco, visiting sites of cultural significance. While in that country they take the opportunity to undertake the important task of educating their children about such matters. The ground applied for is within an area that the Kuruma Marthudunera People know well and in which they

feel comfortable and from which they derive physical and spiritual well-being.

72 Mr Finlay is concerned that many of the activities that are undertaken by his people in and around the ground applied for will be unable to be undertaken if GPLA8/63 is granted. He believes that mining activity will scare away wildlife and may cause damage to flora, both of which consequences will adversely affect their traditional community activities. He is knowledgeable about types of flora that are found on the ground applied for and lists in his affidavit some 28 different varieties. I accept his evidence in that regard.

73 The presence of Mineralogy on the land without any agreement having been achieved between Mineralogy and the Kuruma Marthudunera People has had the consequence that the Kuruma Marthudunera no longer wish to visit or stay in the area for their traditional purposes while that presence continues. He considers that Mineralogy is disrespectful of his people's culture.

74 The Kuruma Marthudunera are very concerned that people engaged in mining activities will become sick if they have contact with any sacred sites and that if anything on the land is dealt with in an improper way, it will cause sadness to his people, whether it is done in ignorance or otherwise.

75 Mr Finlay concludes his affidavit by asking that the tenement not be granted without the Kuruma Marthudunera group being given the opportunity to have proper consultation.

76 **Ms Anne Wally** made an affidavit on 9 June 2007. It was tendered as her evidence-in-chief in these proceedings. She said in evidence that the contents of the affidavit are correct. She gave no further evidence-in-chief. She was cross-examined. On the basis of her affidavit and her cross-examination I make the following findings of fact.

77 Ms Wally is a member of the Kuruma Marthudunera native title claimant group. She is a Marthudunera person. The ground the subject of GPLA8/63 is well known to her. Her mother was born some 10 kilometres to the west of the ground applied for. One of her aunts was born close by and members of her mother's family are buried about one kilometre west of the proposed tenement. She was born in the area, namely, between Mardi Station and Wirruwandi Plain where her mother was born. As a child she was shown over the ground applied for by her grandfather. I was not told when she was born. She describes herself in

her affidavit as a pensioner, although I do not know what sort of pension she is receiving. She did not appear to me to be old enough to be receiving an aged pension.

78 In 1980 she moved from Mardi Station where she had grown up to Roebourne. She still visits Mardi Station, including the ground applied for with her family approximately 12 times a year. The last time she camped out there was at the beginning of June 2007. In the opinion of Ms Wally the area in and around the ground applied for is the richest hunting area in the whole country because of the fresh water and the salt water that is there. By "country" I take her to mean the traditional country of the Kuruma Marthudunera People. When in the area, she and her family hunt wildlife, they gather other food and they gather medicine.

79 Traditional spirits of the Marthudunera live along the Fortescue River which is to the west and to the south of the ground applied for. Based upon maps tendered in evidence, I estimate that the shortest distance between the Fortescue River and the closest part of the ground applied for is about four kilometres. The closest point is in the south-western corner of the ground applied for.

80 Ms Wally believes that those who are not of the Kuruma Marthudunera People should ask permission from the Kuruma Marthudunera before visiting or hunting in the area of the proposed tenement, otherwise the spirits might get them.

81 Ms Wally and her family obtain fresh water and catch fish from Edwards Creek and Du Boulay Creek, both of which run through the ground applied for. There are spirits associated with those two creeks. She said that mining will affect the spirits and that people, black and white, will get hurt from them.

82 Ms Wally said that she is aware of a number of sites near the ground applied for. As an example she referred to what she called a "baby thalu" site near Mardi Station woolshed, a few kilometres to the west of the ground applied for, which is for women who want to have a baby. She said the thalu itself is a tree and that if the tree dies, the thalu spirit dies and the thalu will not work any more. She said that there are men's sites in the area that she would not know about and believes that it is likely that there are sites within the ground applied for because the old people camped all through those areas. In her opinion it is necessary to do a survey of the proposed tenement to know exactly what sites are there.

83 As I understood what she said, in cross-examination, she expressed the opinion that there are too many things that she now sees happening on the ground applied for. She said that, according to her culture, if mining activities take place on the ground applied for, that could affect other areas of significance to her people that are not within the ground applied for. Spirits associated with those places could also be affected.

84 **The affidavit of Ms Southalan** was produced by consent as her evidence-in-chief. She did not appear in person as counsel for Mineralogy did not wish to cross-examine her. From the affidavit of Ms Southalan I make the following findings of fact.

85 As at the date of her affidavit, 10 May 2007, she was a solicitor employed by the principal legal officer of PNTS. The principal legal officer of PNTS is the solicitor on the record for the Kuruma Marthudunera registered native title claimants under the NTA. She was employed as a solicitor with PNTS in 2000 and acted for the Kuruma Marthudunera native title claimants in relation to mining and exploration projects conducted by Mineralogy and associated companies. She acted in that capacity until mid-2001 when she ceased employment with PNTS. She was re-employed by PNTS for some months in 2005. She recommenced employment with PNTS in Perth as a solicitor in January 2007. In that capacity she has been working in connection with Mineralogy's Cape Preston Project with which GPLA8/63 is associated.

86 In 2001 Ms Southalan prepared submissions in relation to the public environmental review of Mineralogy's project. In her submissions she described contact between the Applicant and the Kuruma Marthudunera group and Mineralogy. Ms Southalan has attached to her affidavit two letters dated 19 January 2007 and 28 February 2007 respectively from PNTS to DIA and a letter from DIA to PNTS dated 16 March 2007 concerning Mineralogy's Cape Preston Project. The two letters from PNTS raise concerns of the PNTS about the difficulty that PNTS has experienced in obtaining information from Mineralogy concerning their project. The letters also raise the issue of a document of Mineralogy described as the "Cape Preston Aboriginal Heritage Management Plan" not having been provided to PNTS and Mineralogy not having provided details of the work they wish to do on the tenements that Mineralogy holds in the Cape Preston area.

87 The first letter requests DIA to send a copy of the heritage management plan to PNTS. In the second letter from PNTS to DIA, PNTS acknowledges that DIA had indicated that it would not be

providing a copy of that plan and repeats the request for a copy to be provided to PNTS. The letter of 16 March 2007 from DIA to PNTS acknowledges receipt of a letter dated 28 February 2007 addressed to the Chairman of the Aboriginal Cultural Material Committee in relation to a s 18 notice submitted by Mineralogy under s 18 of the *Aboriginal Heritage Act* 1972. On its face DIA's letter of 16 March 2007 is not a response to the letter of PNTS dated 28 February 2007. In the letter of 16 March 2007 DIA advises PNTS that the committee has considered Mineralogy's s 18 notice and deferred further consideration of it and referred it back to Mineralogy with a request to provide "... *clearer specification of survey coverage and methodology; an outline of any further consultation activity since 2001/2004; specification of heritage protection zones for sites within the land applied for and not subject to developmental impact*". DIA indicated that it had deferred a decision as to whether further submissions should be received directly. In relation to the request of PNTS for a copy of Mineralogy's s 18 notice and supporting documentation, DIA "recommended" that at that stage of the process PNTS seek that material from Mineralogy.

88 On the basis of Ms Southalan's affidavit (par 8) I find that DIA has refused to voluntarily provide PNTS with a copy of the s 18 application and any reports lodged in support of that application and that PNTS had, shortly prior to the date of the affidavit of Ms Southalan, made a formal request to DIA for such information under the *Freedom of Information Act* (WA). I find that, as stated by Ms Southalan in her affidavit, Mineralogy has not discussed the s 18 application with PNTS or with the Kuruma Marthudunera working group.

89 In the submissions prepared by Ms Southalan in 2001 in relation to the PER, Ms Southalan has described her knowledge and understanding of contact between Mineralogy and the Kuruma Marthudunera group. She says that difficulties had been experienced in dealings with Austeel since early 2001. She says that Austeel had not consulted adequately with relevant Aboriginal groups to the date of the submissions, that it had appointed inappropriate consultants to undertake ethnographic and archaeological heritage surveys and that PNTS had been instructed to oppose Austeel's approach to the conduct of such surveys. She says that the PER does not properly address Austeel's contact with local Aboriginal people and is incorrect in several respects. By way of example of why serious concerns are raised in respect of Austeel's conduct she sites an example of a meeting organised by Austeel in Roebourne that she says addressed heritage issues in a divisive manner; she says that undertakings made by Austeel at that meeting were subsequently ignored, that

appointment of consultants to address heritage survey issues occurred against the wishes of many Aboriginal people and that Austeel had recently indicated that it considered Aboriginal heritage information acquired by it to be information that belongs to and is confidential to the company.

90 Ms Southalan notes that at some time during 2000 Austeel conducted bulk sampling and drilling work without any heritage survey being undertaken. She says that PNTS was informed by Austeel that a "desktop" survey had been undertaken by Mr O'Connor but that PNTS had not seen the report of the survey. She says that the Kuruma Marthudunera claimants were not informed or consulted at all regarding that work that was done in 2000 or its impact on heritage sites. She says that the report by Mr O'Connor is referred to in the PER and that a request by PNTS to Austeel for a copy of it was refused on the basis that it was confidential company information not for distribution. She notes that the PER refers to three Aboriginal people with whom "discussions were held" during the study, namely, Patricia Cooper, Wilfred Hicks and Cane Hicks." She says that none of those people are from the Kuruma Marthudunera native title claimant group. She says that the PER notes that the Kuruma Marthudunera People have not identified any sites of significance under the *Aboriginal Heritage Act* but says, however, that PNTS is not aware of any heritage survey commissioned by Austeel with the participation of the Kuruma Marthudunera People having been undertaken or attempted as at the date of the PER.

91 Ms Southalan said in her response to the PER that in January (in, I infer, 2001), at a meeting at which PNTS and Austeel and others were present, Austeel accepted an offer by PNTS to provide Austeel with a detailed proposal outlining what heritage work would need to be done on the project before ground-disturbing work could occur and that Austeel agreed to provide PNTS with maps and information to assist PNTS in its preparation of the proposal. She says that despite repeated requests Austeel had never provided PNTS with adequate maps. She also says that the attempts of PNTS to prepare the heritage proposal were thwarted by the appointment of Mr O'Connor and a Mr Quartermaine as heritage consultants. She says those two persons were appointed directly by Austeel. She says that at a subsequent meeting of 1 February 2001 attended by Austeel and by an officer of PNTS, the PNTS officer confirmed that arrangements for a heritage survey was a matter upon which the Kuruma Marthudunera group needed to decide. She says that the PNTS representative indicated to those present at the meeting that the

Kuruma Marthudunera group may have concerns regarding the appointment and role of Mr O'Connor and Mr Quartermaine.

92 Ms Southalan says that on 9 February 2001 Austeel informed the Kuruma Marthudunera group that Mr Quartermaine had been employed to undertake the archaeological survey and that Austeel later wrote to PNTS explaining that the company did not recognise any right of the Kuruma Marthudunera to choose a heritage consultant, especially if they were not going to pay for the consultant. She says that PNTS had advised Austeel on numerous occasions that the Kuruma Marthudunera group was willing to assist regarding heritage matters but that the group must be involved in the choice of a suitable heritage consultant. Ms Southalan then says that on 15 February Austeel informed PNTS by facsimile that: "*Austeel will always recognise the Pilbara Native Title Service's ... role ... provided ... that [PNTS] carries out [its] role in such a way that Austeel's interests are not jeopardised*".

93 In her response to the PER Ms Southalan makes reference (page 14) to the "public meeting" held by Austeel in Roebourne for two days commencing on Monday, 19 February. She says that PNTS was only informed of the meeting by Austeel on Friday, 16 February. She says that on 14 February the Perth office of PNTS had received from Austeel a large number of sealed letters addressed to Kuruma Marthudunera people. Those letters were couriered by PNTS to it's Karratha office on Thursday, 15 February and PNTS was able to distribute the letters to some members of the Kuruma Marthudunera working group who happened to be present at a meeting in Karratha on 16 February. She said that had PNTS been notified earlier of Austeel's intention to hold the meeting, arrangements could have been made for all members of the claim group to be properly informed in time to attend the meeting.

94 Concerning the conduct of the meeting, Ms Southalan says (14) that Austeel's representatives arrived over an hour and a half late on a hot day that was not conducive to elderly people being prepared to wait in the sun for that period of time. PNTS officers attended on both days of the meeting. She says that members of the Kuruma Marthudunera group informed Austeel's representatives, including Mr Vimal Sharma who gave evidence before me that the group did not wish to work with Mr Quartermaine on the proposed archaeological survey. She says that, another representative of Austeel, said that Austeel would not tell the people which consultant they must work with as that would be wrong and that the Kuruma Marthudunera people who were at the meeting relied upon that statement in their later actions regarding Cape Preston. She

says that members of the Kuruma Marthudunera also informed the Austeel representatives that all decisions regarding heritage and other matters concerning the native title claim group were to be decided at meetings of the group and not by individuals. She describes how Mr Cane Hicks and Mr Wilfred Hicks spoke privately with Austeel's representative. She mentions that some tension was created by the presence of another Aboriginal group whose traditional country was not connected with the ground the subject of the project. She expressed the opinion that the meeting was not organised or handled at all well and that the way it was handled suggests a total lack of familiarity with Aboriginal affairs on the part of Austeel's officers and a lack of commitment by Austeel to genuine consultation. She says that the meeting provided little useful result for the process of dealing with Aboriginal heritage relevant to the project.

95 Ms Southalan notes that at the time when Austeel's representative told the Kuruma Marthudunera People at the Roebourne meeting in February 2001 that Austeel would not tell them which consultant they had to work with Mr Quartermaine had already been appointed.

SUBMISSIONS AND CONCLUSIONS

Subsection 74(1a) of the Act – Mining Operations Statement

96 The Objectors submit that GPLA8/63 was not accompanied by a mining proposal or a statement in accordance with subs 74(1a). Mineralogy asserts that it has lodged a statement in accordance with subs 74(1a).

97 Subsection 74(1) of the Act, when applied in accordance with subs 90(2) of the Act to an application for the grant of a general purpose lease, requires that the application shall be accompanied by, *inter alia*, a mining proposal or a statement in accordance with subs (1a) of s 74. "Mining proposal" is defined in s 70O as a document that is in a form required by guidelines approved by the Director-General of Mines for that purpose and which contains information that the guidelines require about proposed mining operations in, on or under the land in respect of which the general purpose lease is sought. Mineralogy does not claim that such a mining proposal accompanied GPLA8/63.

98 Subsection 74(1a) of the Act specifies what must be set out in the alternative "statement" that must accompany an application for a general purpose lease. It says that it shall: "*... set out information about the*

mining operations that are likely to be carried out in, on or under the land to which the application relates including information as to - (a) when mining is likely to commence, (b) the most likely method of mining, (c) the location, and the area, of land that is likely to be required for the operation of plant, machinery and equipment and for other activities associated with those mining operations". Subsection 74(7) says that "likely" means "*reasonably likely having regard to the information available to the applicant when the application is made*".

99 In providing, pursuant to s 90, that various specified provisions of the Act that relate to mining leases shall apply to general purpose leases and applications for the grant of general purpose leases, it is also provided in s 90 that, in every case, the specified provisions apply "*with such modifications as the circumstances require*". In the case of subs 74(1a) I consider that "mining operations", which is exclusively defined in s 8 of the Act, and "mining", which is inclusively defined in s 8, are both words that require modification in accordance with s 90 of the Act when those words are used in the context of an application for a general purpose lease.

100 In addition to defining "mining" and "mining operations", s 8 of the Act also contains a definition of "mine" as a verb, namely, it "... *includes any manner or method of mining operations*". "Mining operations" is defined exclusively, taking in, *inter alia*, both extractive mining work and treatment of extracted ore. It expressly includes removal of overburden, stacking, deposit, storage and treatment of any substance considered to contain any mineral, together with "*the doing of all lawful acts incident or conducive to any such operation or purposes*". I consider that the "mining" and "mining operations" in respect of which information is to be given pursuant to subs 74(1a) in connection with an application for a general purpose lease does not include information about the matters set out in pars (a) to (c) of subs 74(1a) in relation to any other mining tenement in connection with which the general purpose lease is sought. The Act does not expressly require that a general purpose lease may only be applied for or granted to a person who holds a mining lease. It is, however, necessary that the applicant for a general purpose lease, for purposes of s 74, set out in a statement that accompanies the application for such a tenement the time when mining operations are likely to commence on the ground applied for, the most likely method by which such mining operations will be carried out and the locations and areas of land required for the operation of plant, machinery, equipment and other activities associated with such operations.

101 "Accompanied" is not defined in the Act. It meaning is that given in ordinary usage in the legislative context. As used in pars (b), (c), (ca) of subs 74(1) of the Act, and as used in other similar provisions of the Act, it means and has the effect that the subs 74(1a) statement must be lodged with and at the same time as the application for the grant of the general purpose lease is lodged.

102 The letter of Mr Strizek to the Minister dated 28 September 2006 which accompanied Mineralogy's application for the grant of the general purpose lease does not comply with subs 74(1a) of the Act. It does not say when the mining operations that are to be undertaken on the ground applied for are likely to commence. It does not state what those mining operations are likely to be beyond, at best, adopting the "purposes" attached to the application for the tenement. Those purposes are expressed so broadly and with so little particularisation that they could not possibly fulfil the requirements of subs 74(1a) insofar as that subsection requires information about the mining operations that are likely to be carried out on the proposed general purpose lease. The letter contains no detail at all about the location or the area of land that is likely to be required for the operation of plant or machinery or other equipment. There is no description of the proposed location of other activities. More significantly, there is no information provided at all as to either the location or the area of land likely to be required for each of the extraordinarily varied and unparticularised range of activities set out in the list of purposes attached to the application for the tenement.

103 The letter of 28 September was, I find, intended solely for the purposes of subss86(3) and (5) of the Act which say that the area of a general purpose lease granted by the Minister shall not exceed 10 hectares unless the Minister is satisfied that a larger area of land is required for the purposes of the lease and that an application for the grant of a lease that exceeds 10 hectares must be accompanied by a statement specifying the reasons why such an area of land is required for the purposes of the lease. The letter of 28 September 2006 expressly refers to s 86 of the Act and the necessity for Mineralogy to seek the approval of the Minister for a general purpose lease to be granted in excess of 10 hectares.

104 By the previously mentioned letter dated 22 January 2007 which is four months after the date of lodgment of GPLA8/63, Mr Strizek wrote to the Director, Mineral and Titles Services Division of the Department. The letter is headed "*Re: Mining Statement to Support the Application for GPL8/6308/63*". The letter sets out in five paragraphs a cryptic description of what Mineralogy intends to do on its mining leases 8/126 to

130 and of current JORC resource estimates for those mining leases, an estimation of the amount of tailings that it is anticipated will be produced by mining operations on those mining leases and a proposed date of commencement of mining on the mining leases in around 2009 to 2010. A description of the method of mining on those tenements is given. There is brief comment about sources of power and water and the limited current capacity of Mineralogy to store waste from those mining operations. It is then said that:

> "*Tailings storage, water storage and mineral storage will be accommodated within lease G08/63. This lease will provide sufficient area for the current development and future expansion of the infrastructure necessary to exploit the Balmoral South magnetite deposit.*"

105 Reference is then made to Mineralogy having commissioned a review of the project requirements in respect of that deposit. The Layout Plan accompanied the letter. It is said that the plan identifies the major infrastructure believed to be necessary for the successful operation of the project. On the attached Layout Plan almost the entire area of land applied for by GPLA8/63 is shown as being taken up by various facilities. Those facilities include three areas described as "*tailings dam and water management distribution and reticulation facility*", a "*mineral storage facility*", a "*tailings dam expansion capacity*" area, an "*aircraft landing facility*", a "*communications facility*" and a "*mineral storage facility*".

106 I consider that the letter contains what could be described as the barest minimum of information required by s 74 as to the nature of the operations likely to be carried out on the ground applied for and the location of and area of land likely to be required for some of the activities to be undertaken. Not surprisingly, there is no mention at all of facilities connected with the majority of the "purposes" for which the lease is sought as attached to GPLA8/06. What is indicated to me by the inclusion of such broad and, in some cases, patently unnecessary purposes for which the lease has been sought, together with the failure of Mineralogy to ensure that a statement that complied with s 74 of the Act accompanied the application for the tenement when it was lodged, is that Mineralogy considers that it is unnecessary to give much attention to the express requirements of the legislation or to the purposes of those requirements.

107 As I will note later in these reasons, that attitude is, in my opinion, also reflected in its approach to communication and negotiation with and a

consideration of the concerns of the Objectors as well as its understanding and appreciation of the objectives of the *Aboriginal Heritage Act* and its obligations thereunder. I consider it to be most inappropriate for a general purpose lease application to fail to genuinely particularise purposes for which the lease is sought - that is the case in GPLA8/63.

108 I consider it to be the intention of Parliament, expressed in par 75(6)(b) of the Act, that the Minister is not obliged in every case to refuse an application for the grant of a general purpose lease where there has been non-compliance with the provisions of the Act by the applicant. In this case, in relation to the non-compliance by Mineralogy with the provisions of s 74 of the Act, there are some factors that I consider the Minister could properly take into account in determining that the non-compliance should not result in a refusal. Those matters are that the Minister will be aware of the nature of the proposed mining operations on the granted mining leases in connection with which GPLA8/63 is made. The Applicant did subsequently lodge, well before the hearing of this matter before the Warden, a statement that could be said to comply, to some extent at least, with the provisions of s 74. In the circumstances I am not prepared to recommend refusal of the grant of the tenement on the basis of non-compliance with s 74.

Area Applied for Exceeding 10 Hectares; s 86

109 The Objectors say that the reasons set out in the letter of Mr Strizek of 28 September 2006 which accompanied GPLA8/63 are insufficient to demonstrate that an area larger than 10 hectares is required for purposes of the lease. The Objectors note that in his letter Mr Strizek sets out only four reasons why a tenement in excess of 10 hectares should be granted and that those reasons are entirely related to administrative convenience. The reasons set out in Mr Strizek's letter are that the grant of one large GPLA8/63 reduces the administrative burden for both the State and the Applicant, and thus avoids an "administrative nightmare" which would otherwise be the case if over 1000 leases were applied for over the same area. He says that, with the grant of one large lease, service of notices will be much more efficient, proceedings before the Warden will be easier to follow and it will be easier for objections to be heard once rather than multiple times. He also says that surveying and advertising will be less.

110 The Applicant submits that the statement in the letter of 28 September 2006 that the lease is required as part of the Balmoral South Project which is planned to be completed in 2009 at a capital cost of

$1.5 billion and to produce $2 billion of export income is enough to satisfy the Minister that an area in excess of 10 hectares is required.

111 In my opinion, the purported reasons are inadequate. It serves absolutely no purpose for the Applicant to reiterate the reasons why subs 86(3) and (5) are included in the Act. The administrative benefits to applicants and to the State are self-evident. The objective of subs 86(3) and (5) may well be to achieve such conveniences, however, the mere achievement of that objective is something completely different from the Minister being satisfied that a larger area of land than 10 hectares is "required." Again, Mineralogy has demonstrated either a lack of understanding or appreciation of the legislative requirement or an unwillingness to comply with the legislation.

112 The provisions of subs 75(6) of the Act give to the Minister a discretion to grant whether or not the provisions of subs 86(5) have been complied with. The discretion given by par 75(6)(b) to the Minister to grant a general purpose lease irrespective of whether the Applicant has or has not complied in all respects with the provisions of the Act is extremely wide. I am of the opinion, however, that it is not so wide as to permit the Minister to grant a general purpose lease where the Minister is not satisfied that a larger area of land than 10 hectares is required. Subsection 86(3) is expressed in mandatory terms. It, in my opinion, binds the Minister to limit the size of a general purpose lease to 10 hectares in circumstances where the Minister is not satisfied that the larger area is required. That does not mean that it is only in cases where he is positively satisfied that an area larger than 10 hectares is not properly required that he must refuse to grant in excess of that area. The onus is on an applicant to satisfy the Minister that the larger area is properly required. It is, in my opinion, evident that the purpose of Parliament is to ensure that larger areas than are properly and genuinely required should not be granted for general purpose leases and that it is a mandatory pre-condition of the grant of a general purpose lease exceeding 10 hectares in size that the Minister be satisfied that the larger area is required. "Required" in subs 86(5) does not mean simply required by the applicant. It must mean reasonably needed, from an objective standpoint, for the permitted purposes in connection with mining operations.

113 In the present case I am of the view that it could not be said that the Minister would not be satisfied on the basis of all of the material that has been presented to me that an area in excess of 10 hectares is not properly required by Mineralogy. Further, I consider that it would be open to the Minister to receive additional information in that connection. I am of the

opinion that, although subs (5) requires the application for the tenement to be accompanied by a statement specifying why the area required is in excess of 10 hectares is, it is not the case that the Minister may not reach that conclusion from other sources and may not receive other reasons and other information in connection with the reasons put forward by the Applicant. I am of the view that it is only at the point of grant that the Minister must have reached the requisite satisfaction and not at any time prior to that. For those reasons I will not recommend that GPLA8/63 be refused because of any failure to comply with s 86. I have also taken into account that the letter of Mr Strizek of 22 January 2007 - the "mining statement" - does contain some information that may be referred to by the Minister for purposes of considering whether or not the Minister is satisfied for purposes of subs 86(3).

The Purposes for which GPL8/63A8/63 is applied for

114 The Objectors submit that a general purpose lease can only be granted for the purposes expressly set out in subs 87(1) or for any other "specified purpose". Subsection 87(1) says:

> "*A general purpose lease entitles the lessee ... to the exclusive occupation of the land in respect of which the general purpose lease was granted for one or more of the following purpose –*
>
> *(a) for erecting, placing and operating machinery thereon in connection with the mining operations carried on by the lessee in relation to which the general purpose lease was granted;*
>
> *(b) for depositing or treating thereon minerals or tailings obtained from any land in accordance with this Act;*
>
> *(c) for using the land for any other specified purpose directly connected with mining operations.*"

115 Subsection 87(2) says that the purpose for which a general purpose lease is granted shall be specified in the lease. The Objectors say that grant of GPLA8/63 is not sought for a specified purpose within the meaning of s 87 of the Act.

116 The Objectors note that, in its Form 21 application for the tenement, Mineralogy has stated that the purposes for which the tenement is sought are set out in an attachment to the Form 21. In that attachment it is said, expressly, that the general purpose lease is "*... for infrastructure facility*

including any of the following ...". There then follows, word for word, a recital of the whole of the definition of "infrastructure facility" which appears in s 253 of the NTA with the exception of par (b) thereof - a jetty or port - and of par (i) - "*any other thing that is similar to all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines in writing to be an infrastructure facility for the purposes of this paragraph*". I have set out the proposed purposes in para 1 of this report.

117 The Objectors say that there is no definition of "*infrastructure facility*" in the *Mining Act* or any other written law of Western Australia. It is said that, as a matter of ordinary language, the phrase may encompass an enormous range of things and that even if regard is had to the inclusive list set out in the application, that list does not specify a purpose or purposes within the meaning of s 87. It is noted that, for example, it is not specified whether coal or some other mineral will be stored, what *"other"* transport facility is proposed or what is meant by "*water management facility*". The Objectors also say that an airport is not a matter that comes within a permitted purpose for a general purpose lease, it not being machinery in connection with mining operations, nor having a purpose connected with the depositing or treating of minerals or tailings. In relation to par 87(1)(c), the Objectors draw attention, in that regard, to the requirement that any specified purpose other than the purposes in pars (a) and (b) are to be "directly" connected with mining operations. It is also noted that in reg 42B of the Mining Regulations, which includes a list of purposes for which a miscellaneous licence may be granted, an "aerodrome" is expressly included. The Objectors say that the inclusion of an aerodrome as a purpose for which a miscellaneous licence may be granted confirms that a general purpose lease is not an appropriate tenement for such a facility. The Objectors submit that because of the lack of precision and detail, the Warden and the Minister, in the public interest, are unable to undertake the exercise of considering whether the proposed tenement should be granted because it cannot be known what the Applicant may ultimately use the area for.

118 The Applicant says that s 87 provides that the purposes for which a general purpose lease may be granted pursuant to s 86 includes the use of the land the subject of the general purpose lease for specified purposes directly connected with mining operations. Reference is made to the broad definition of "mining operations" in subs 8(1) of the Act which includes "*... the doing of all lawful acts incident or conducive to any such operations or purposes are otherwise included in that definition*". It is submitted that it is unreasonable to expect the Applicant to undertake

detailed and expensive studies and plans in order to satisfy s 87 of the Act. It is contended that, in that sense, an airport is relevantly connected to mining operations that would be carried out by the Applicant on its mining leases.

119 In their "*Applicant's Response to Objector's Request for Further and Better Particulars*" dated 8 February 2007, in response to a written request for particulars as to "*... which of the nine kinds of infrastructure in the AGPL8/63 will be constructed and in which part of the tenement, including maps*", the Applicant merely said that the application was part of a large project, that the infrastructure facilities proposed are vital to the project and that in addition to the particulars provided in the response further details of the project are available in the public domain on various Web sites which were specified. That is an entirely inadequate and improper response to the particulars that were sought. It is an improper response to do no more than refer the Objector to, as the Applicant itself called them, "*large*" documents and leave it to the Objector to trawl though those documents and to then try and distil from those documents an answer to its request for particulars.

120 The Applicant then went on, in par 5 of its response to the Objector's request for particulars, to again recite, this time without leaving out par (b) and par (i), the entire NTA definition of "infrastructure facility". Not only did that provide nothing of assistance to the Objector but it included what had previously been deleted by amendment, namely, a jetty or port, together with the extremely broad and catch-all par (i), namely, any other thing similar to those mentioned in pars (a) to (h) inclusive that the Commonwealth Minister determines to be an infrastructure facility. That, again, was an inadequate and improper response to the request for particulars. It provided no assistance to the Objector and no assistance can be derived from it by either the Warden or the Minister.

121 Mineralogy then made reference to the letter and the contents of the letter dated 22 January 2007 from Mr Strizek to the Director, Mineral and Titles Services Division, DOIR. A copy of that letter was annexed to the particulars. That letter, together with the attached "*layout drawing of the planned project*", (ie the Layout Plan) as I previously mentioned, provides basic details as to the type and location and, to some extent, by reference to the scale, the size of named facilities. Those facilities include tailings and water management distribution and reticulation, mineral storage, aircraft landing facility, road, bridges and pipelines. It is noted, without any particularisation, that roads, railways, bridges and other transport facilities are necessary but that the Applicant is not able to detail all of the

particulars "*as this will depend on (among other things) the grant of the application for G08/63*".

122 It is said that the Applicant proposes that power for the processing plant and the mining operations will be generated using a gas-fired power station and that gas will be obtained via the Dampier to Bunbury gas pipeline which runs through the southern end of the proposed GPLA8/63. It is said, in connection with the stated purpose of "*storage, distribution or gathering or other transmission facility for oil or gas or derivatives of oil or gas*" merely that fuel will be required for a variety of purposes associated with the project. It is then said that it would be necessary to temporarily stockpile and store iron ore mineral product before it is exported. It is also said that provision has been made for tailings dams, water management, distribution and reticulation facilities as set out in the previously referred to layout map.

123 Mineralogy then notes that the "jetty or port" infrastructure facility has been removed from the GPLA8/63 application. In respect of the inclusion in the particulars of par (i) from the NTA definition of "infrastructure facility", the Applicant does not confirm that any such purpose is no longer one for which the general purpose lease is applied for and, in fact, states that the Applicant is "*... unable to provide any further particulars at this stage*" in respect of that catch-all purpose.

124 As to the Objectors' request for particulars of consultation with the Objectors, the response is no more than to attach an extract from the PER (done in connection with the mining lease applications) and a reference to the letter of 13 September 2006 to Mineralogy from the DIA about which I have previously commented.

125 Although the response to particulars is less than adequate in some areas, nevertheless, there has been some narrowing, but to a very limited extent, of the purposes for which the general purpose lease is sought.

126 The provisions of the Act and the Mining Regulations which apply to the making of an application for the grant of a general purpose lease do not expressly require that the purposes for which the lease is to be used be specified in the application. As a matter of practice, however, it is my experience that applications generally contain a statement of the purposes for which the ground applied for is required. In any event, pursuant to subs 74(2) of the Act, it is open to the Registrar or the Warden to request that the Applicant furnish such information in relation to the application as the Warden or Registrar requires and, pursuant to subs 74(5), any such

information that is furnished in response to such a request must be made available for public inspection.

127 In my opinion GPLA8/63 should be dealt with by the Minister on the basis that the purposes for which the tenement is sought are those that are specified in the Layout Plan that accompanied the letter of Mr Strizek of 22 January 2007. I am of the opinion that, if the Minister does grant the application, it would be most inappropriate, and most likely ultra vires in any event, to include as a specified purpose any purpose that could be, in effect, subsequently determined by a Minister of the Commonwealth as is contemplated by par (i) of the NTA definition of "infrastructure facility". In my opinion an application by an applicant for a general purpose lease which seeks any such "purpose" is defective and contrary to the Act. It is improper because it would purport to give to a Commonwealth Minister the discretion that is reserved to the State Minister to specify the purposes for which such a tenement may be granted. It is improper because of the uncertainty it would create. I consider that, in general terms, it is entirely inappropriate in the making of any general purpose lease application to simply lift out of the NTA the definition of "infrastructure facility" and incorporate it into the Form 21 application for the grant of a tenement under the *Mining Act*. It is a lazy and inadequate way of purporting to bring the application within the purposes permitted by s 87 and it will inevitably result in particularisation being necessarily required.

128 I consider that, although an "aerodrome" is a facility that is specifically included in the list of purposes for which a miscellaneous licence may be granted, that does not necessarily preclude it from being included as one of the purposes which is a proper purpose, in an appropriate case, for which a general purpose lease may be applied for and granted. In a case such as the present where a large area is sought and may be granted, if it is apparent that an aerodrome or airport facility has a legitimate direct connection with and can be said to be part of "mining operations" as defined in subs 8(1) for purposes of s 87, then it cannot be said that a grant which includes such a purpose as a specified purpose is not permitted by the Act. It has not been demonstrated in the present case by the Objector that an airport or aerodrome is not sufficiently connected with the proposed mining operations on the ground applied for as to make a grant that specifies such a purpose inappropriate. I am not satisfied that the purposes for which GPLA8/63 has been applied for, as described in the letter of Mr Strizek of 22 January 2007, are not within the purposes contemplated by s 87 of the Act.

Aboriginal Heritage Act

129 The Objectors submit that the protection provided by the *Aboriginal Heritage Act* (WA) 1972 is not necessarily sufficient to adequately protect Aboriginal heritage. They say that, because of that, in appropriate circumstances it may be in the public interest that a tenement not be granted or conditions be imposed because of the impact on Aboriginal heritage. In that regard the Objectors make reference to what is said in the ruling given on a number of preliminary issues in the matter of ***BHP Billiton Pty Ltd v Karriyarra Native Title Claimants*** [2004] WAMW 22 at 42 to 43 and what is said in the report and recommendation to the Minister in the matter of ***BHP Billiton Pty Ltd v Karriyarra Native Title Claimants*** [2005] WAMW 12 at 100, 107 and 111.

130 In the former case I said, in effect, that the provisions of the Aboriginal Heritage Act did not mean that a Warden had no jurisdiction or power to deal with objections concerning matters that are dealt with by that Act and by the Aboriginal and Torres Strati Islander Heritage Protection Act 1984 (cth) in the hearing of an application for the grant of a mining tenement. I also said that it was not the case that because both of those Acts, are intended to provide a means of protection and preservation of the subject matters of those Acts, it did not follow that it was not proper or appropriate for conditions to be imposed upon the grant of a tenement that were designed and intended to reinforce or supplement the provisions of the those Acts.

131 In the latter case I agreed (100) with the submission made by the objectors therein that in some circumstances the AHA may not in practice achieve as much by way of ensuring protection as may be achieved by other means, including the imposition of conditions pursuant to the *Mining Act* upon the grant of a tenement. I concluded in that case, however, that it was not necessary to have resort to the provisions of s 111A in the context of the relevant circumstances, including, in particular, the demonstrated genuine desire of the applicant, BHP Billiton, to identify and preserve and protect, in full co-operation with the Native Title claimants, Aboriginal sites that were then known and sites which may become known in the future. I considered that there was no aspect of that case that would justify a refusal pursuant to s 111A to grant the miscellaneous licences there sought, nor was there any justification for the imposition of particular conditions in respect of Aboriginal sites. The demonstrated attitude and conduct of Mineralogy towards the Objectors in the present case falls way below that demonstrated by the applicant BHP Billiton towards the Karriyarra Native Title claimants and is a cause for

my belief and that it is unlikely that the Mineralogy will, either prior to or after grant (if that occurs) give proper consideration to the identification of or protection or preservation or due accommodation of things and matters of cultural significance to the Objectors or to matters connected with the exercise of claimed or, potentially, determined native title rights under the NTA.

132 The Applicant's submissions and responses to the issues of cultural heritage raised by the Objector are as follows. The Applicant says that the AHA and the NTA afford sufficient protection for Aboriginal heritage. It says that the Objector's native title related submissions are beyond the jurisdiction of the Warden in relation to a general purpose lease because the NTA provides a right to negotiate a regime which addresses these matters. It is said that before a general purpose lease can be granted the State is required to notify the Objectors and the applicant will be required to consult with the Objectors about ways of minimising impacts on registered native title rights and interests (s 24MD(6B) NTA).

133 It is claimed by Mineralogy that it has adequately consulted with the Objectors and says that the Objectors' submission that the Applicant has acted unreasonably in failing to consult and has demonstrated a propensity to deal inadequately with the interest of the Objectors is unfounded and, in any case, is irrelevant to the proceedings before the Warden. It is said that the affidavit evidence of Mr Sharma demonstrates that the Applicant has and will continue to give the Objectors a fair and reasonable opportunity to discuss their concerns. Reference is then made to details of consultation to be found within the PER, the supplementary environmental review and an EPA bulletin, bulletin 1056. It is also said that the Applicant recently offered to enter into a heritage agreement with the Objectors in respect of GPLA8/63 and that that agreement would involve a heritage survey.

134 Mineralogy says, further, that there is no requirement under the *Mining Act* for the Applicant to conduct a heritage survey or enter into a heritage agreement with the Objectors. It says that, in any event, the Objectors have been included in heritage surveys previously co-ordinated by the Applicant.

135 I adhere to the views that I expressed in the two matters involving BHP Billiton and the Karriyarra native title claimants to which I have just made reference. I am of the opinion, based upon the evidence before me, that Mineralogy, through, in particular, Mr Sharma, does not have, and has not in the past had, a genuine desire to consult in an appropriate

manner with the Kuruma Marthudunera People in respect of the cultural and environmental concerns of the latter. The statements made by Mr Sharma in his affidavits are based, in the main, upon what he has been told by employees of and consultants engaged by Mineralogy. Where there is a conflict between the material presented by Mr Sharma in that regard and that presented by the witnesses for the Objectors I accept as correct the evidence of the Objectors' witnesses.

136 Mr Sharma has repeatedly said in his affidavits that Mineralogy will comply with all of its obligations under the NTA and the AHA. In my opinion, in order to be able to comply with both of those Acts it is necessary and fundamental that the Applicant engage in a genuine and appropriate consultation process in respect of all matters that are or may be relevant to the implementation of both of those Acts. The evidence of the Objectors' witnesses makes it clear that it has not done so. In my opinion the affidavit evidence of Mr Sharma demonstrates that Mineralogy's approach to Aboriginal heritage issues will be that at the present time and in the future nothing more is required for purposes of the AHA than that Mineralogy comply with s 18 of that Act. All that s 18 requires is that the tenement holder must give to the Committee notice in writing that he requires to use the land for a purpose which, unless the Minister gives his consent under this section, would be likely to result in a breach of section 17 in respect of any Aboriginal site that might be on the land. The tenement holder must then await the decision of the Minister to refuse or grant consent to the required use. In essence, the protection afforded by s 18 of the Act relates to sites that are, in the context of the *Mining Act*, known to the tenement holder or are identified sites in respect of which there is a public record to which the tenement holder may have access. Section 15 of the AHA says: "*Any person who has knowledge of the existence of any thing in the nature of Aboriginal burial grounds, symbols or objects of sacred, ritual or ceremonial significance, cave or rock paintings or engravings, stone structures or arranged stones, carved trees, or of any other place or thing to which this Act applies or to which this Act might reasonably be suspected to apply shall report its existence to the Registrar, or to a police officer, unless he has reasonable cause to believe the existence of the thing or place in question to be already known to the Registrar."* It does not compel the holder of a mining tenement to conduct any relevant survey. It is not intended to be , and is not, a means of endeavouring to ensure that such things or places as it refers to will be searched for or identified by the tenement holder.

137 The purposes of the AHA and the NTA insofar as they relate to such sites are potentially significantly frustrated in circumstances where an

applicant for or the holder of a mining tenement has not conducted an appropriate survey or surveys in order to identify sites of relevant significance before commencing mining operations. In my opinion, the appropriateness of any such surveys must almost necessarily be judged in the context of whether or not there has been proper consultation with the Aboriginal group or groups that have a bona fide cultural connection with the ground the subject of the particular tenement application. There has not been appropriate consultation in this case. There has not been on the part of Mineralogy a genuine desire or attempt to consult and negotiate with the Kuruma Marthudunera People as a whole or as a native title claimant group or with any of their duly appointed representatives. There is a marked and significant contrast between the conduct and attitude of, for example, the applicant, BHP Billiton, in the case that I have previously referred to and that of Mineralogy. I have no confidence and, with respect, I cannot see how the Minister could be confident, that the attitude of Mineralogy is likely to change at any time in the future. My opinion is in part derived from what I considered to be the clearly expressed view of Mr Sharma that it is sufficient that Mineralogy do no more than give notices pursuant to s 18 of the *Aboriginal Heritage Act*. In broad terms, his evidence in general, including his repeated assertions that Mineralogy's project involves billions of tonnes of ore and billions of dollars, suggest to me that he, and therefore Mineralogy, considers that such commercial matters overwhelm and should be taken as overwhelming the legal rights of the Objectors as Native Title claimants, and overwhelming the provisions and purposes of the AHA and the legitimate concerns of the Objectors and their desires to protect and preserve their claimed interests in the ground applied for.

138 I consider, therefore, that, because of the inadequacy of Mineralogy's attitude and action in regard to its responsibilities in respect of relevant Aboriginal cultural and heritage matters, in particular, in connection with the Objectors, it is not in the public interest, for purposes of s 111A, of the Act that the tenement be granted. Alternatively, I consider that, in contra-distinction to the circumstances that existed in the BHP Billiton case referred to above, the attitude and conduct of Mineralogy towards the cultural interests and concerns of the Objectors is such as requires that, if the tenement is granted, in whole or in part, there should be express conditions, and not merely endorsements, that require the tenement holder, to comply with the provisions of the *Aboriginal Heritage Act* and the *Aboriginal and Torres Strait Islander Heritage Protection Act.*

139 I find that the views expressed in evidence by Mr Finlay and Mr Wally and Mr Southalan are representative of the views of the Objectors.

A most significant factor that leads me to the conclusion that in the circumstances that have emerged from the evidence presented to me it would be open and appropriate to the Minister, for the purposes of s 111A, to be satisfied on reasonable grounds in the public interest that the land should not be disturbed or that the application should not be granted or to be satisfied on reasonable grounds of both of those matters, is that the information that has accompanied GPLA8/63 reveals that a very large proportion of the whole of the ground applied for will be directly taken up in the construction of the facilities that are proposed in Mr Strizek's letter and that almost the whole of the ground applied for is most likely to be disturbed directly or indirectly by the construction of the facilities and by the use of those facilities upon completion of construction. That is in the context of the total area of the ground applied for being 107 square kilometres and the total area of the "*Project Infrastructure*" described in the letter of Mr Strizek dated 22 January 2007 being not less than 76.7 square kilometres.

140 That 76.7 square kilometres does not include a calculation for the proposed aerodrome, roads, railway, bridge or other transport facility, electricity generation, transmission or distribution facility, fuel storage facility, any pipeline, channel or other water management distribution or reticulation facility, cable, antenna, tower or other communication facility, all of which are particularised in the Applicant's response dated 8 February 2007 to the Objectors' request for further and better particulars. The location and areas of those additional proposed facilities is unknown and, when added to the area of 76.7 square kilometres specified by Mr Strizek in his letter, will have the effect that a much greater proportion of the ground applied for will be, directly or indirectly, subjected to mining operations.

141 All of that is to be viewed in the context of what I consider to be the applicant's demonstrated attitude towards the Objectors of "take it or leave it" in relation to proper consultation with the Objectors and the attitude that I perceive emerges from the affidavits of Mr Sharma, namely, that little more needs to be done in respect of the Objectors' concerns and in respect of Aboriginal sites that are or will become known to Mineralogy than to seek approval under s 18 of the *Aboriginal Heritage Act*. Such an approach ignores the fact that a proper survey conducted in the spirit of proper co-operation with the Objectors concerning Aboriginal cultural issues has not been undertaken and that s 18 of the *Aboriginal Heritage Act* is not designed or intended as a means of discovering the existence of relevant sites that must be preserved and protected.

142 The potential adverse consequences of the grant of such a large tenement in circumstances where it is proposed that all but a small percentage of that large area will be directly subject to mining operations and where all of the remainder is most likely to be indirectly subjected to and affected by such mining operations, in circumstances where there has been an inadequate assessment of matters that are directly relevant to Aboriginal cultural and heritage issues and to claimed native title rights of the Objectors that may in the future be determined to exist, and where the Applicant has demonstrated that it does not intend to undertake any adequate assessment of such matters, I consider, elevates the interests and concerns of the Objectors well beyond what might be described as mere private interests to the level of a public interest of a nature that attracts the provisions of s 111A and is capable of justifying the exercise by the Minister of the Minister's discretion to refuse to grant GPLA 8/63, pursuant to s 111A of the Act.

143 It is a matter of considerable public concern, of the type contemplated by s 111A, that, the genuine and reasonable concerns of the Objectors and the potential for sites of cultural significance to the Objectors to be damaged or destroyed or otherwise impinged upon and the potential for claimed native title rights that may subsequently be determined to exist to be adversely affected have not been, and, if the Applicant has its way, will not be, adequately addressed or responded to or taken into account by the Applicant.

Procedural Rights

144 For the reasons that I have expressed in the two ***BHP Billiton*** cases previously referred to I am of the opinion that the procedural rights given to registered native title claimants by the provisions of s 24MD(6A) of the *Native Title Act* include rights that derive from the provisions of the *Mining Act* in connection with the marking out of ground for the purposes of the making of an application for the grant of a mining tenement which is applied for for the sole purpose of the construction of an infrastructure facility and that such rights include any procedural rights as are derived from Div 3 of Pt III of the *Mining Act* concerning private land.

145 I consider that it is irrelevant that land the subject of a registered native title claim does not fall within the definition of "private land" in subs 8(1) of the *Mining Act*. It is not a characterisation of the land the subject of a native title claim as "private land" as defined in the *Mining Act* that attracts the provisions of subs 24MD(6A) of the NTA. The criteria that attract the operation of the provisions of subs 24MD(6A) are

that the person or persons in question are registered native title claimants over an area of land in respect of which they are given the same procedural rights that they would have if they held "ordinary title" to the land in respect of which they have registered their claim to native title; "ordinary title" meaning, in Western Australia, a freehold estate in fee simple.

141 While it may be convenient, as a matter of shorthand expression, to describe the procedural rights given by subs 24MD(6A) of the NTA to registered native title claimants as being the same as if they were "private land holders", it is not the case that in order for the procedural rights to apply the land must also be "private land" for purposes of Div 3 of Pt III of the *Mining Act* as defined in subs 8(1) of that Act. With respect, I do not agree with the conclusions reached in that regard by Warden Richardson M and Warden Temby M respectively in ***Dodsley Pty Ltd v Applicants for the Thudgari Native Title Claim*** [2003] WAMW14

146 and in ***Hamersley Iron Pty Ltd v Puutu Kurnti Kurrama Pinikura Native Title Claimants*** [2006] WAMW 7. It is important to bear in mind that it is only "procedural rights" that are given to registered native title claimants by subs 24MD(6A) and that it does not follow from that that in respect of rights that are not such procedural rights native title claimants are to be treated as if they were the holders of freehold title. In my opinion, it is not relevant to enquire whether or not the grant of a permit to enter for the purpose of marking out of a mining tenement can constitute a future act under the NTA.

147 Mineralogy concedes that no permit to enter was obtained by it for purposes of entering the land the subject of the Objectors' registered native title claim for purposes of marking out the ground applied for. Although they were not formally relied upon by the Applicant at the hearing before me, Mineralogy filed and served the affidavits of compliance of Brett Smail sworn 20 March 2007 and Wayne Stewart sworn 20 March 2007 and the affidavit of Mr Stewart sworn 24 October 2006 in which is set out evidence of the physical marking out of the ground applied for on 26 and 27 September 2006 by Mr Smail. Mr Smail's affidavit clearly states that he either dug trenches or in lieu thereof used rocks and placed stakes in the ground to mark out and identify some of the corners of the ground applied for in accordance with the Mining Regulations. He was thus, I find, physically present on or immediately adjacent to the ground applied for.

148 The copy of the DOIR quick appraisal in respect of GPLA8/63shows that 100 per cent of the ground applied for is over ground the subject of

the Objectors' native title claim. It is my understanding that both parties accept that the ground the subject of GPLA8/63 is wholly contained within the ground the subject of the Objectors' registered native title claim and that, in order to mark out the ground the subject of GPLA8/63, Mineralogy, through its agent Mr Smail, did enter the land the subject of the Objectors' native title claim and that no permit to enter the land the subject of the native title claim for the purposes of marking out GPLA8/63 was obtained at any time by Mineralogy.

149 In ***BHP Billiton Pty Ltd v Karriyarra Native Title Claimants*** (*supra*) I expressed my opinion as to the application of the provisions of Div 3 of Pt III of the *Mining Act* to an application for the grant of a miscellaneous licence over land the subject of a registered native title claim. I still hold the views that I expressed in that case. I consider that what I said then applies equally to an application for the grant of a general purpose lease where the purpose for which such a lease is sought is of the construction of a facility which falls within the NTA definition of "infrastructure facility". GPLA8/63 is an application of that type.

150 In the present case, therefore, Mineralogy was required to obtain from the Warden a permit to enter the land the subject of the Objectors' registered native title claim and to thereafter comply with all requirements of the *Mining Act* connected with the exercise of its rights pursuant to the permit to enter. I consider that the procedural rights that flow to the registered native title claimants in accordance with NTA, s 24MD in respect of an application for the grant of a general purpose lease are the same as those which flow where the application is for a miscellaneous licence and are as I have set them out in ***BHP Billiton Pty Ltd*** [2004] WAMW 22. In that case I said (14):

> "*I am of the opinion that the decision of the High Court in Bromley v Muswellbrook Coal Co Pty Ltd (1973) 129 CLR 342 still has application to the provisions of the MA* (ie Mining Act (WA)) *and that its effect is that, as a matter of law, entry upon and marking out of private land for the purposes of obtaining a grant of a mining tenement under the MA where the necessary permit has not been issued by the Warden is unlawful and that the unlawful marking out cannot be the basis for the grant of a mining tenement.*"

151 In using the words "private land" in that passage to describe land which is entered and marked out, I meant, in the context of the matter

before me, freehold land and thus land the subject of "ordinary title" referred to in subs 24MD(6A). I further said (15):

> "*... I do not consider that failure to obtain a permit to enter private land can be said to be a mere defect or irregularity of procedure, nor that it can be said that failure to obtain a permit prior to marking out will not have the effect that the marking out is not nugatory or otherwise incapable of supporting a subsequent application for the granting of a mining tenement. There is no inconsistency between the interpretative approach taken by Menzies J in Bromley and that expressed by any of the members of the High Court in Project Blue Sky. The decision of Menzies J was, in effect, that the statutory context of the relevant prohibition was such that, taken together with the way in which it was expressed, it was evident that the intended effect of non-compliance was as found by Menzies J.*"

152 In my opinion, in accordance with the decision of the High Court in ***Bromley v Muswellbrook Coal Co Pty Ltd*** (1973) 129 CLR 342, it is unlawful for the purpose of the marking of an application for the grant of a mining lease of land in respect of which a freehold estate in fee simple is held by any person, to enter that land in order to mark out the ground without having obtained a permit to enter. To enter and mark out when no permit has been issued is not a matter of mere non-compliance with the provisions of the Act for purposes of par 75(6)(b) of the *Mining Act* which does not have the consequence that the purported marking out cannot support the application for grant of the tenement applied for. I consider that the Minister is not entitled to grant a mining lease - and therefore not entitled to grant a general purpose lease - in such a case "irrespective" of whether the Applicant has unlawfully entered and marked out private land as defined in subs 8(1). There are, for purposes of s 26MD, procedural rights that arise from the provisions of the Mining Act that relate to permits to enter in order to mark out on private land. The effect of NTA s26MD is that the same procedural rights are given to registered Native Title claimants where the land marked out is the subject of a registered Native Title Claim. The consequence of failing to obtain a permit to enter land that is the subject of a registered Native Title claim must be no different to the consequence of failing to obtain a permit to enter land that is the subject of "ordinary title", that is, land that is within the definition of "private land" in the Mining Act.

153 I am of the opinion that the legislative objective of Parliament in enacting the provisions of Div 3 of Pt III of the *Mining Act* included an

objective of balancing the interests of the owners or occupiers of private land, on the one hand, and those of applicants for the grant of mining tenements on the other hand and that, in achieving such a balance, Parliament intended that the right of the owner or occupier of private land to exclusive control over the land, including, in particular, the right to withhold permission to third parties to enter or undertake activities on the land, be preserved in respect of marking out entry and activity unless the necessary permit was obtained and complied with. I am of the opinion that it was the intention of Parliament that entry without a permit for the purposes of marking out and for the purpose of making an application for the grant of a mining tenement was not a lawful act which could ultimately result in the grant of a mining tenement.

154 In my opinion the failure of Mineralogy to obtain a permit to enter and to otherwise comply with the provisions of Div 3 of Pt III of the *Mining Act* has the consequence that GPLA8/63 is not an application which empowers or enables the Minister to grant the tenement. It is, therefore, arguably not an application in respect of which a Warden may make a recommendation. If, however, a GPLA8/63 is an application in respect of which a Warden must in such circumstances conduct a hearing and make a report and recommendation and in respect of which the Minister must make a determination, then my recommendation is that, because of the failure of Mineralogy to obtain a permit to enter for the purposes of marking out GPLA8/63, the application be refused.

The Pastoral Lease

155 The DOIR quick appraisal annexed to the affidavit of Mr Sharma of 18 June 2007 shows land affected by GPLA8/63 as including pastoral lease 3114/1027, 95.8 per cent of which is within the ground applied for by Mineralogy. Mineralogy submitted that the High Court decision in ***State of Western Australia v Ward*** [2002] HCA 28 clearly establishes that while native title rights and interests can co-exist with pastoral leases, those native title rights will not extend to the native title holder (or claimant) having the right to control access to land, ie, the grant of a pastoral lease will extinguish any native title right to control access to land. It is said that, therefore, native title holders or claimants cannot maintain an action in trespass. It is noted on behalf of Mineralogy that a pastoral lease is expressly excluded from the definition of "private land" in subs 8(1) of the *Mining Act*. It is said that, as a consequence thereof, the Objectors did not have a right to and in fact did not and have not objected to Mineralogy marking out GPLA8/63.

156 The Objectors say that the absence of a right to control access or to maintain an action in trespass is irrelevant to the legal requirement to afford registered native title claimants the same procedural rights as the holders of freehold titles. I agree with the Objectors. A right to control access is not a "procedural right" for purposes of s 24MD(6A) of the NTA. It is the registration of the Native Title Claim that identifies the area of land to which the procedural rights attach. The procedural rights that are given to registered native title claimants by subs 24MD(6A) of the NTA are procedural rights that have application whether or not any other person has any rights of title or use or occupation and whether such other person's rights or title or use or occupation are derived from a leasehold interest or not.

Subsection 29(2) of the *Mining Act* says that, except with the consent in writing of the owner or the occupier of private land, a mining tenement cannot be granted where specified activities are being undertaken or where specified sites exist or on which a substantial improvement is erected unless the grant is only in respect of land that is not less than 30 metres below the lowest part of the natural surface of the private land one specified activity is a garden a well or spring is a specified site.

158 The Objectors say that subs 29(2) gives to an owner or occupier of private land rights that are procedural rights for purposes of subs 24MD(6A) of the NTA. It is submitted that in his affidavit of 10 May 2005 Mr Finlay details how the whole area of the proposed tenement contains flora which is regularly utilised by the Objectors and that, "*from the perspective of the Objector*", the whole area of the proposed tenement is a "garden" for purposes of par 29(2)(a). It is also said that in the affidavit of Mr Finlay and in that of Anne Wally sworn 9 June 2007 there is evidence that Edwards Creek and Du Boulay Creek run through the ground applied for by Mineralogy and constitute or contain wells or springs. In my opinion natural flora is not what is contemplated as a "garden" in par 29(2)(a) of the Act. I consider that that paragraph is aimed at a cultivated garden or orchard and not naturally occurring native flora. There is, in my opinion, no evidence contained in the two affidavits relied upon by the Objectors of any "wells or springs" that are located in the ground applied for.

Compensation

159 The Objectors submit that they are in "occupation" of the ground applied for by Mineralogy. They are, it is said, therefore, occupiers of the

area for purposes of the *Mining Act*. Reliance is placed upon the decision of the High Court in ***Western Australia v Ward*** (2002) 213 CLR 318. Reference is then made to s 35 of the *Mining Act* which says that the holder of a tenement shall not commence mining on the surface or within 30 metres of the surface of any private land unless and until he has paid or tendered to the owner and the occupier the amount of compensation that is required to pay under the Act or has made an agreement about that with the owner and occupier.

160 It is said that by virtue of the provisions of subs 24MD(6A) of the NTA and s 10 of the *Racial Discrimination Act* the Objectors must be afforded that same procedural right to compensation prior to the commencement of mining operations. In response, Mineralogy says that the Objectors are not the owners or occupiers of the ground applied for. Mineralogy says that s 35 of the *Mining Act* is irrelevant because it deals with private land and the land the subject of the proposed tenement is not private land. The Applicant denies that s 10 of the *Racial Discrimination Act* has any application.

161 In my opinion s 35 can only have application after a tenement has been granted and where the holder of the tenement would otherwise be able to commence mining on the tenement, or where, a permit to enter having been issued pursuant to s 30, the private land holder or occupier has suffered damage caused by the holder of the permit during the currency of the permit. Thus it appears that, even if any rights that accrued to the holder of a freehold title pursuant to s 35 or s 30 in respect of compensation can be properly described as procedural rights for purposes of subs 24MD(6A) of the NTA, those rights do not have any scope for application in the present case there having been no permit issued and no tenement granted.

Environment

162 The evidence called by the Objectors in respect of environmental issues is very limited in its scope, and in its detail, and is very generalised. There is, apart from the mere size of the area and applied for and the size of the proposed infrastructure facilities, no information in respect of the environment before me which would justify the intervention of the Minister pursuant to the provisions of s 111A based upon any relevant matter of public interest arising out of the evidence before me or that would otherwise justify my recommending refusal of GPLA8/63. If the Minister grants GPLA8/63, then I consider that a condition should be imposed upon the grant of the tenement that requires the tenement holder

to conduct an appropriate environmental survey in respect of which there must be continuous bona fide consultation with representatives of the Objectors selected by the Objectors, the survey to be undertaken on terms and conditions to be agreed between the Objectors and Mineralogy and, failing such agreement, on terms and conditions to be determined by the Director, Environment, DOIR.

RECOMMENDATION

163 For the reasons that I have expressed above I recommend that the Minister refuse the grant of GPLA8/63.

164 If the Minister does determine that GPLA8/63 be granted, then I recommend that, in addition to appropriate standard conditions and the condition that I have mentioned in para 162 (**Environment)**, the following conditions as suggested by the Objectors be imposed upon grant:

165 • If the tenement holder lodges any mining proposal in respect of the general purpose lease as required by subpar 82A(2)(a) and obtains any written approval for the mining proposal pursuant to par 82(2)(b) of the Act, then the tenement holder, shall serve a copy of the mining proposal (excluding sensitive commercial data) within 10 days of lodgment and shall serve on the Objector a copy of every written approval for any mining proposal within 10 days of the date of such approval having been given.

166 • Before any construction work is commenced on or below the surface of the ground the subject of the tenement the tenement holder is to prepare a management plan in consultation with persons chosen by the Objectors. The plan is to take into account the interests and concerns of the tenement holder and of the Objectors. Consultation on the part of both parties is to be bona fide and both the tenement holder and the Objectors are to use their best endeavours to reach agreement in the preparation and execution of any such management plan, but failure to reach agreement after bona fide consultation is not to have the effect that any proposed construction activities or matters and things as are authorised by the general purpose lease may not be undertaken.

167 Before the tenement holder conducts any activities on or below the surface of the ground the subject of the lease the lessee must commission

and obtain comprehensive Aboriginal archaeological and ethnographic heritage surveys of the whole of the lease. The commissioning and the survey are both to be undertaken in consultation with the Objectors and on terms and conditions to be agreed between the tenement holder and the Objectors but, if agreement cannot be reached, then on terms and conditions to be determined by the Minister or the Minister's delegate in consultation with the tenement holder and the Objectors.