JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	OPEN COURT
LOCATION	**:**	PERTH
CITATION	**:**	FMG PILBARA P/L V YINDJIBANRDI ABORIGINAL CORP [2011] WAMW 13
CORAM	**:**	WILSON M
HEARD	**:**	16, 17 & 19 MAY 2011
DELIVERED	**:**	18 AUGUST 2011
FILE NO/S	**:**	OBJECTIONS KR 102/090, KR 133/101, KR201/090, KR 253 & 254/090
TENEMENT NO/S	**:**	APPLICATIONS FOR M 47/1453, L'S 47/350, 361, 367 & 368
BETWEEN	**:**	FMG Pilbara Pty Ltd (Applicant) V Yindjibarndi Aboriginal Corporation as Trustee for the Yindjibarndi Aboriginal People (Objector)

Catchwords:

Application for mining tenement – mining lease – miscellaneous licence
Objection – public interest grounds – Treaty obligations – religious observance
Public interest – Aboriginal heritage – Native title claimants
Miscellaneous Licence – Mining Lease - Objection – Carry out religious observances – Australia's Treaty obligations – International Covenant on Civil and Political Rights

Legislation:

Native Title Act 1993 (Cth): s. 38
Mining Act 1978 (WA): s. 41, 42, 44, 46, 46A, 47, 51(1a), 71, 74, 75, 91, 92, 94, 111A
Mining Regulations 1981 (WA): r. 42B
Aboriginal Heritage Act (1987) (WA): s. 5, 39

Result:

Recommend to Hon. Minister that application for M 47/1453 be granted on conditions to be determined.

Application for L 47/361 granted on conditions to be determined.

Applications for L 47/350, 367 and 368 be adjourned in order to allow procedures under the Native Title Act 1993 (Cth) – s. 24MD (6B) (c) to (g) to be followed with liberty for the parties to apply on 72 hours notice.

Representation:

Counsel:

Applicant	:	Mr G Donaldson SC & Mr A Papamatheos
Objector	:	Mr G Irving & Ms K House

Solicitors:

Applicant	:	Lawton Lawyers
Objector	:	Slater & Gordon

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

Re: Warden French ex parte Serpentine Jarrahdale Ratepayers Association (1994) 11 WAR 315

Re: Warden Heaney ex parte Serpentine Jarrahdale Ratepayers and Residents Association (1997) 18 WAR 320

Re: Warden Calder ex parte Cable Sands (1998) 20 WAR 343

Striker Resources NL v Benrama Pty Ltd and ors [2001] WAMW 7

Sinclair v Maryborough Mining Warden (1975) 132 CLR 473

Case(s) also cited:

Daniel v Western Australia [2005] FCA 536

Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273

Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 120

BACKGROUND

FMG Applications

1. FMG Pilbara Pty Ltd ("FMG") is the applicant for one Mining Lease being M 47/1453 ("the M") and four Miscellaneous Licences being L's 47/350, 361, 367 & 368 ("the L's"). FMG intends to mine the land the subject of the M for iron ore and to build associated infrastructure upon the land the subject of the L's. The M and the L's comprise part of a group of mining tenements within an area named the "Solomon Project" by FMG.

2 Various approvals have been obtained for the construction of a railway spur line to transport iron ore mined from the Solomon Project to an existing railway network belonging to an associate company of FMG namely The Pilbara Infrastructure Pty Ltd. Those approvals are contained within the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004 (WA)*.

3. Mining leases 47/1409 and 1411 have already been granted within the area of the Solomon Project after a determination of the Native Title Tribunal pursuant to s. 38 of the Native Title Act in ***FMG Pilbara Pty Ltd/ Wintawari Guruma Aboriginal Corporation/ Ned Cheedy and others on behalf of the Yindjibarndi People/Western Australia [2009] NNTTA 99***. An appeal by Yindjibarndi Aboriginal Corporation ("YAC") to the Federal Court against the determination of the Native Title Tribunal pursuant to s. 38 of the Native Title Act in the above matter was dismissed in ***Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2010] FCA 690***. An appeal to the Full Court of the Federal Court of Australia in the above matter remains outstanding as at the date of the hearing of the objections to the applications for the M and the L's. An application by YAC for the stay of the orders permitting M 47/1409 and 1411 to be granted was dismissed in ***Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2010] FCA 1305***.

4. Applications for miscellaneous licences 47/362 and 363, located within the Solomon Project, have been granted and are subject, at this time, to other regulatory approvals processes.

The Objectors

5. The YAC is the trustee for the Yindjibarndi Aboriginal People ("Yindjibarndi People") and is the objector to the applications by FMG for the M and the L's.

6. In ***Daniel v Western Australia [2005] FCA 536*** a native title determination was made by Nicolson J which confirmed the Yindijbarndi People hold native title rights over a large area of the Pilbara region of Western Australia. The area of land the subject of the native title determination in the ***Daniel's*** case is located to the north of and **is not over** the area the subject of the M or the L's.

7. His Honour Justice Nicolson in the ***Daniel's*** case ordered the YAC to hold the native title rights and interest of the Yindjibarndi People in trust for the Yindjibarndi People.

8. There is currently a registered native title claim, being Claim WC03/3, made by claimants, other than the YAC, over the land the subject of the M and the L's. Accordingly at this time neither the YAC nor anyone else has been determined to hold native title over the area the subject of the M and the L's.

GROUNDS OF OBJECTION

9. By previous order of this court dated 19 August 2010 the grounds of objection by YAC against the applications for the M and the L's where all amended to add 4 new grounds of objection. At the commencement of the hearing of the objections to the applications for the M and the L's, YAC abandoned all but 2 of its grounds of objections to the M and L's. Accordingly, the remaining grounds of objection to the M and the L's by YAC are grounds 8 and 10 that state:

> *"8. It would be contrary to the public interest to grant a Miscellaneous Licences for a purpose that is connected to mining lease applications which are the subject of the Appeals, prior to the final determination of the Appeals.*
>
> *10. The grant of the Miscellaneous Licences will prevent Yindjibarndi people from freely carrying out their religious observances and exercising their religious beliefs and is thus contrary to the public interest."*

COMPLIANCE WITH INITIAL REQUIREMENTS OF MINING ACT

11. YAC do not take issue that FMG has complied with all of the initial requirements of the Mining Act and Regulations in respect to the application for the M and the L's.

12. In that regard FMG compiled a book containing copies of all documents lodged with the Department of Mines and Petroleum that demonstrate compliance with the initial requirements of the Mining Act and Regulations pertaining to the applications for the M and the L's.

13. I am satisfied on the balance of probabilities and find that FMG have complied with the initial requirements under the Mining Act and Regulations pertaining to the applications for the M and each of the L's.

EVIDENCE PRODUCED BY CONSENT

14. The Applicant produced into evidence with the consent of YAC the following affidavits:

- Damon Edwards sworn 4 March & 12 August 2010 and 25 March & 11 May 2011,
- Kenneth John Green sworn 25 March, 12 May 2011,
- Alexa Kate Morcombe sworn 25 March 2011(excluding para 36 and the 2nd and 3rd sentence of para 42),
- Philip Irwin Richards sworn 29 April & 13 May 2011,
- Denice Jayne Johns sworn 11 May 2011,
- Adam Groeneveld sworn November 2009, 17 March 2010 & 11 May 2011,
- Kathryn Moran sworn 13 May 2011,
- Maya Abela sworn 13 May 2011, and,
- Julie Irene Gilbert sworn 11 November 2010,

15. The YAC produced into evidence with the consent of FMG the following affidavits:

- Michael Woodley sworn 10 June 2010 and 4 April 2011, and,
- Ned Cheedy sworn 8 April 2011.

16. Also produced into evidence were the following:

- A 3 size Book of Maps of the area in question (by FMG),
- Letter from FMG to YAC dated 22 August 2007 (by YAC), and,
- Undated Agreement between FMG & YAC dated 16 August 2007.

ORAL EVIDENCE

17. The only oral evidence given in this matter was that of Ms Alexa Morcombe ("Ms Morcombe") a lawyer employed by FMG. The evidence of Ms Morcombe was not greatly in dispute and can be summarised as evidence that demonstrated FMG had for some years negotiated with YAC in respect to

various agreements regarding native title and aboriginal heritage issues within lands the subject of operations and interest to FMG.

18. On or about 6 July 2009 negotiation between YAC and FMG broke down in respect to aboriginal heritage issues within the Yindjibarndi # 1 Native Title Claim area.

19. As a consequence of the breakdown in communication between FMG and YAC, and at the suggestion of the Department of Indigenous Affairs, FMG began to speak to another group of people within Yindjibarndi People in an attempt to be informed of matters pertaining to aboriginal heritage sites.

20. Ms Morcombe was approached by Mr Michael Woodley on behalf of the YAC and directed by Mr Woodley not to speak to the Yindjibarndi People with whom FMG had approached as the only representative of the Yindjibarndi People was the YAC.

21. As a consequence FMG has been unable to advance further talks with YAC to resolve issues pertaining to aboriginal heritage issues.

22. The evidence of Ms Morcombe is not in issue as to the chain of events that unfolded in respect to the breakdown of negotiations between YAC and FMG on issues of aboriginal heritage.

THE LAW PERTAINING TO THE M AND THE L's

Mining Lease

23. In summary, s. 74 of the Mining Act provides the manner in which an application for a mining lease may be made. Section 75 of the Mining Act provides the manner in which a person may lodge an objection to the grant of a mining lease and also provides the manner in which an objection is determined.

24. Section 71 of the Mining Act provides the Minister may after receiving a recommendation of either the mining registrar where no objection has been lodged or, after the hearing of any objection to the grant of a mining lease by the warden pursuant to s. 75 of the Mining Act, grant to the applicant a mining lease on such terms and conditions as the Minister considers reasonable.

Miscellaneous Licences

25. In summary, s. 91 of the Mining Act provides the manner and purposes for which an application for a miscellaneous licence may be made by a person.

Further, s. 91 of the Mining Act, read with sections 42 and 92 of the Mining Act, provides the manner in which an objection may be made and the manner in which an objection to a miscellaneous licence application is heard.

26. The prescribed purposes for which an application for a miscellaneous licence may be applied for are contained within r. 42B of the Mining Regulations. No issue has been raised by YAC that the purposes for which FMG seeks the grant of the L's are not prescribed purpose pursuant to r. 42B of the Mining Regulations. Accordingly, I find the purposes for which FMG seeks the grant of the L's are for prescribed purposes pursuant to the provisions of r. 42B of the Mining Regulations.

27. The provisions of s. 92 of the Mining Act applies the provisions relating to prospecting licences in sections 41, 42, 44, 46, 46A, 47 and 51(1a) of the Mining Act "with such modifications as the circumstances require, to and in relation to a miscellaneous licence".

28. The grant of a miscellaneous licence lies with the mining registrar where no objection to the grant is lodged. Where an objection to the grant of a miscellaneous licence is lodged the warden, having heard from the parties, may grant or refuse the application.

29. Both the mining registrar and the warden may impose such conditions as they deem reasonable upon the grant of a miscellaneous licence.

30. The provisions of s. 94 of the Mining Act provides a right of appeal by an applicant for a miscellaneous licence to the Minister from a decision of the mining registrar or the warden if the application is refused or is granted on conditions the applicant considers unreasonable.

SECTION 111A OF THE MINING ACT

31. Both of the remaining grounds of objection against the grant of the M and the L's say such grants would be "contrary to the public interest". YAC contend the Warden should not recommend the grant of the M to the Minister nor should the L's be granted by the Warden.

32. Objections to the grant of mining tenements on public interest grounds are provided for in s. 111A of the Mining Act which states:

111A. Minister may terminate or summarily refuse certain applications

(1) The Minister may —

> (a) by notice served on the mining registrar or the warden, as the case requires, terminate an application for a mining tenement before the mining registrar or the warden has determined, or made a recommendation in respect of, the application; or
>
> (b) refuse an application for a mining tenement,
>
> if in respect of the whole or any part of the land to which the application relates —
>
> (c) the Minister is satisfied on reasonable grounds in the public interest that —
>
> (i) the land should not be disturbed; or
>
> (ii) the application should not be granted;
>
> or
>
> (d) a person who in relation to the land was formerly the lessee of a mining lease the term of which has expired, or is a person deriving title through such a former lessee, has subsequently made a late renewal application and the Minister, being satisfied that the requirements of that expired mining lease and of this Act in relation to that lease had been substantially observed (other than as to the timing of an application for renewal) and that the person has continued to observe those requirements as if the term of the lease had not expired, determines that the renewal application should be approved and grants that renewal.
>
> (2) In subsection (1)(d) ***late renewal application*** means an application made in the manner prescribed for the purposes of section 78 (except that it was not made during the final year of the term of the lease) for the renewal of the lease with effect from the expiry of the term of the lease.
>
> (3) Notwithstanding anything in this Act, an application to which a notice referred to in subsection (1) (a) applies ceases to have any effect for the purposes of this Act when that notice is served.
>
> (4) The powers conferred by subsection (1) are in addition to any other powers of the Minister under this Act.

PUBLIC INTEREST

33. Relevant to these proceedings is the identification of what could be considered to be in the public interest and the conflict between what is a "private interest" and what is a "public interest".

34. This issue was first address in ***Sinclair v Maryborough Mining Warden (1975) 132 CLR 473*** at page 487 when His Honour Justice Jacobs said:

> "The duty of the warden was to examine the applications for mining leases in order to see that in form they fulfilled the requirements of the *Mining Act* and the regulations. It was also necessary for him to consider whether in all the circumstances the public interest or right would be prejudicially affected if they should be granted. If he formed the opinion that it would be so affected it was his duty to recommend that the applications for mining leases should be rejected. The public interest is an indivisible concept. The interest of a section of the public is a public interest but the smallness of the section may affect the quantity or weight of the public interest so that it is outweighed by the public interest in having the mining operation proceed. It does not however affect the quality of that interest. The warden looked for what he described as the public interest as a whole and he did so in contradistinction to the interest of a section of the public. Moreover, he limited the area of public interest to the section of the public who propounded the views expressed by the objector. This was not permissible. The views may have been propounded by a section of the public but the matters raised went to the question of the interest of the public as a whole. The warden appears not to have given weight to the fact that the evidence produced by the objectors should be regarded as evidence on the public interest generally and needed to be weighed in all the circumstances of the public interest whether or not the evidence and the views therein were put forward by a large or a small section of the public.
>
> On an inquiry of the kind which the warden is required to make it is not possible to describe any onus of proof of a public interest against the grant of a mining lease. Nevertheless, generally speaking, there appears to me to be disclosed by the Act an intention that the grant of mining leases should be recommended unless the grant would be against the public interest. The grant is not dependent on the existence of minerals in the area granted but the proved existence of such minerals and the proved or expected quantity thereof are factors to be considered in determining where the public interest lies, and conversely the absence of such minerals must be weighed against the amount of damage to the environment which mining of the area will produce. The words "public interest" are so wide that they comprehend the whole field of objection other than objection founded on deficiencies in the application and in the required marking out of the land applied for. For instance the public interest may tell against the grant of a mining lease even though the particular interests of an individual are the only interests primarily affected. It may thus be in the public interest that the interests of that individual be not overborne. However, all the objections can be and should be related to the public interest. But private interests as such are not a relevant consideration. So far as they are intended to be protected, they are specifically so protected in the Act itself."

35. The position of the law as it relates to s. 111A of the Mining Act appears to be that contained in ***Re: Warden Heaney ex parte Serpentine Jarrahdale***

Ratepayers and Residents Association (1997) 18 WAR 320 at page 325 when His Honour Justice Franklyn said:

> "Whilst, on their own, private interests are not a relevant consideration, they may well be such if there is a public interest in their protection. It does not necessarily follow (although it might in a particular case) that, because of the provisions of those sections of the Act, there can be no aspect of public interest in an objection lodged by private land owner or occupier who is entitled to the protection provided by those sections. That indeed was recognised by Jacobs J in Sinclair (supra) in the above quoted passage which, in my view, in its entirety, appears appropriate to the concept of "public interest" in the context of the Act. It is important to recognise, however, that in that context the public interest is that identified in s111A. Consequently, in my view, to be relevant as going to "public interest", an objection, whether lodged primarily in respect of a "private interest" or as one of "public interest" must contain a discernable objection concerning the public interest of such a nature as to be capable of exciting the consideration of the Minister under s111A. That is to say, it must be discernable from the objection that it raises a question which, objectively viewed, can reasonably give rise to a concern that the disturbance of the relevant land or grant of the application might not be in the public interest. The determination whether or not such disturbance or grant is or is not in the public interest is a matter for the Minister to be taken into account in the exercise of his discretion under s111A."

36. The role of the mining registrar and the warden in the exercise of their functions associated with recommendations to the Minister in respect to mining leases and exploration licences and particularly the wardens role in the hearing of objections based on "public interest grounds" have been dealt with in a number of cases including ***Re: Warden French ex parte Serpentine Jarrahdale Ratepayers Association (1994) 11 WAR 315***, ***Re: Warden Heaney ex parte Serpentine Jarrahdale Ratepayers and Residents Association (1997) 18 WAR 320*** and ***Re: Warden Calder ex parte Cable Sands (1998) 20 WAR 343***.

37. In summary, those cases concluded the Warden does have a role in hearing objections to applications for exploration licences and mining leases on public interest grounds and then informing the Minister by way of recommendation sufficient for the Minister to either grant the application or refuse to do so.

38. However, it must be borne in mind the decisions referred to above are primarily decisions pertaining to the exercise of the power of the warden when dealing with applications for mining leases and exploration licences. In

that regard, I take notice of those decisions for the purposes of considering the application for the M by FMG.

39. Despite the above cases there still remains some question as to whether the warden has power to hear an objection to applications for miscellaneous licences and prospecting licences based on public interest grounds.

40. The role of the mining registrar and the warden in the exercise of their functions associated with the ability to hear objections based on public interest grounds in respect to applications for miscellaneous licences and prospecting licences was considered by Warden Calder in ***Striker Resources NL v Benrama Pty Ltd and ors [2001] WAMW 7.***

41. In essence, I accept a warden does have the ability to hear objections based on public interest grounds in respect to applications for miscellaneous licences. To that extent, I will follow the decision Warden Calder on this issue in ***Striker Resources.***

42. Despite the decision of Warden Calder in ***Striker Resources*** differing opinions still exist as to whether a warden has or does not have the power to hear objections based on public interest grounds in applications for miscellaneous licences and prospecting licences. Accordingly, this issue remains for all intents and purposes unresolved.

43. YAC contended in its submissions the decision in ***Striker Resources*** settled the issue of whether a warden has the power to hear objections for miscellaneous licences or prospecting licences. In initial submissions by FMG the decision of Warden Calder in ***Striker Resources*** was described as "erroneous". FMG contended the warden has no power to deal with objections based on public interest grounds when hearing applications for miscellaneous licences or prospecting licences.

44. Despite the above, counsel for FMG submitted, despite the initial submissions of FMG on the decision in ***Striker Resources***, any argument on the difficult issue of whether a warden has the power to hear objections based on public interest grounds in applications for miscellaneous licences could be avoided. FMG submitted that, in its opinion, even if the warden were to accept for the purposes of this hearing that a warden can have regard to objections on public interest grounds to applications for the L's none of the remaining grounds of objections raised by YAC are such that they would, in any event, excite the interest of the Minister.

45. Accordingly, I think it appropriate in those circumstances the unsettled issue of whether a warden has the power to hear objections based on public interest

grounds in applications for miscellaneous licences and prospecting licences be left for argument at another more appropriate time and that this matter proceed, as I have indicated, on the basis of the decision in ***Striker Resources***.

Submissions

Ground 8 of the Objection

46. YAC made written submissions that as the same land the subject of the applications for the M and the L's is the subject of an appeal to the Full Court of the Federal Court in respect to the granted mining leases M 47/1409, 1411 and 1413, it would be inappropriate to proceed with the hearing of the objection to the application for the M and the L's until that appeal is determined.

47. In response, FMG submits an attempt by YAC to seek an order from the Federal Court in ***Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2010] FCA 1305*** to stay the hearing of the objections and the applications for the M and the L's was unsuccessful and there remains no lawful reason why this court should not hear the objection to the application for the M and the L's.

48. YAC have in respect to other proceedings been unsuccessful in seeking a stay order to prevent the hearing of the applications for the M and the L's. There is no evidence that YAC has made any other attempts to seek relief from any other court directing this court from proceeding to hear the objections to the applications for the M and the L's. In my opinion, it is not in the public interest, nor is there any lawful reason, why this court should not hear the objections to the applications for the M and the L's.

Ground 10 of the Objection

49. YAC submit the construction of proposed infrastructure on the proposed L's, and for that matter any mining on the proposed M, will have a significant impact upon the native title rights and interests of the Yindjibarndi People, particularly upon the areas where the Yindjibarndi People carry out religious observances.

50. In support of that contention counsel for the YAC submit the affidavit evidence of Mr Woodley and Mr Cheedy provides a comprehensive description of the spiritual and religious relationship between the Yindjibarndi People and their country, the authority structure within Yindjibarndi society, and the ceremonies and rituals that are performed in the land and waters that would be affected by the grant of the L's and the M. The traditional authority structure in Yindjibarndi country and society is reflected

in the positions held by Mr Woodley and Mr Cheedy and is predicated on religious knowledge.

51. It is further submitted by YAC that Mr Woodley and Mr Cheedy are religious leaders who in accordance with the religious beliefs of the Yindjibarndi People are held accountable for the spiritual welfare of both Yindjibarndi People and country because they are the human beings which emanate from that religious domain. The exercise of such religious authority by Mr Woodley and Mr Cheedy is said by YAC to be a religious observance. YAC submit there is evidence before this court that demonstrates an intention by FMG, as demonstrated in the oral and affidavit of Ms Morcombe and others, to prevent the free exercise of that religious observance.

52. In his affidavit, Mr Woodley states the religious requirement for there to be any agreement between FMG and the Yindjibarndi People is based upon reciprocity and respect that being the precondition to the exercise of the rights that will be permitted by the grant of the M and the L's.

53. Mr Woodley describes in his affidavit the spiritual relationship that exists between him and that area of the Yindjibarndi country that will be affected by the applications for the M and the L's and further describes his responsibility in accordance with the traditional laws and customs and religious beliefs of the Yindjibarndi People.

54. Accordingly, the YAC submit the grant of the M or the L's in the absence of a proper agreement between the Yindjibarndi People and FMG will deny the right of all members of the Yindjibarndi People the ability to enjoy their own culture, to profess and practice their own religion will prevent the Yindjibarndi People from carrying out the religious observances required of them in accordance with their religious beliefs.

55. YAC submit that should the M and the L's be granted the resultant denial of the right of the Yindjibarndi People to profess and practice their own religion would breach Article 27 of the International Covenant on Civil and Political Rights ("ICCPR") to which Australia is a signatory. In those circumstances YAC submit it is in the public interest for regard to be had to the obligations imposed upon Australia by the ICCPR.

56. YAC further submit if the M and the L's were granted and FMG were then to exercise its rights to develop the mine and associated infrastructure it would prevent the Yindjibarndi People from performing various ritual religious observances that are associated with sacred sites and areas of significance in the areas of the M and the L's.

57. YAC submits the protection of sites in accordance with the laws and customs of the Yindjibarndi People is itself a religious observance. Despite the provisions of the Aboriginal Heritage Act (WA) ("AHA") it does not adequately protect the sites or the ability of the Yindjibarndi People to continue to practice their religious observances and that is contrary to the ICCPR. The AHA is said by the YAC to be directed to the protection of sites which ought to be preserved on behalf of the Western Australian community and is not directed to the preservation of religious ceremonies and rituals of Yindjibarndi People associated with those sites.

58. Despite the contention by YAC that Australia is a signatory to the ICCPR no evidence or proof of that was produced into evidence. Further, no evidence or authority was cited as to what constitutes a religious minority or a religion for the purposes of the ICCPR.

59. However, an extract of Article 27 was referred to in submissions and states:

> *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture, to profess and practice their own religion or to use their own language".*

60. YAC refers to the case of ***Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273 ("Teoh's Case")*** as authority for the proposition there is nothing contained within the Mining Act that manifests a clear and unmistakable intention on the part of Parliament to abrogate the fundamental freedom to profess and practice religion, in this case, by the Yindjibarndi People.

61. It is therefore submitted by YAC it is in the public interest to protect the unique culture and religion of the Yindjibarndi People within Yindjibarndi country by giving effect to the provisions of the ICCPR and not granting the L's and recommending against the grant of the M.

62. In response FMG submits there is no authority to support the proposition that Australia's international treaty obligations are matters that a warden should consider falls within the public interest. Therefore, FMG submits, a warden ought not to consider a matter to be within the public interest that has not been determined to be so by the Commonwealth or Western Australian Parliament. Those matters that Western Australia legislation provides a warden, in the exercise of his or her jurisdiction, is to grant or report on to the Minister, all concern matters the subject of statutory regulations such as native title, aboriginal heritage and matters associated with the environment.

63. FMG further, submits the obligations under treaties to which Australia is a signatory should not be considered matters of public interest unless they are incorporated into Australian law. Reference was again made to ***Teoh's Case*** particularly paragraphs 25 to 27. FMG submits that ***Teoh's case*** is not an authority for the proposition that a judicial or administrative decision maker in exercising statutory discretion ought to exercise a discretion that is consistent with Australia's treaty obligations. That is said by FMG to be so because it would otherwise require a decision maker to trawl through Australia's treaty obligations prior to making every decision to determine what treaties have or have not been incorporated into Australian municipal law.

64. FMG referred to the decision of ***Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) ("Scientology case") (1983) 154 CLR 120*** and said if the criteria applied by His Honour Chief Justice Mason and His Honour Justice Brennan were applied to this matter it would be unlikely the phenomenon described in the affidavit of Mr Woodley would constitute a religion.

65. According to FMG, the YAC do not contend the grants of the M and the L cannot be made, rather the grants of the M and the L's cannot occur without the agreement of the YAC. If that were to be the case, FMG submits it would amount to a veto over the grant of the M and the L's and that is demonstrably not in the public interest to give any one person or group a veto over the grant of any mining tenements. There is no legislation that demonstrates that such a right has been given either under the Native Title Act, the Mining Act or the AHA. If that were to be the case, submits FMG, no other public interest factors would be a consideration in any circumstances.

66. Finally, FMG submit all matters raised in the objections by YAC come within the ambit of the AHA by reason of the definitions in s. 5 and, as such, are within the jurisdiction of the Aboriginal Cultural Material Committee ("ACMC").

67. The grounds of objections by YAC to the grant of the M and the L's will deny the YAC the ability to practice their religious observance in Yindjibarndi country and thereby breach Australia's obligations under the Article 27 of the ICCPR has been argued and rejected before the Native Title Tribunal in ***FMG Pilbara Pty Ltd/Wintawari Guruma Aboriginal Corporation/ Ned Cheedy and others on behalf of the Yindjibarndi People/Western Australia [2009] NNTTA 99*** and ***FMG Pilbara Pty Ltd/ Ned Cheedy and others on behalf of the Yindjibarndi People/Western Australia [2009] NNTTA 91*** and on appeal to the Federal Court of Australia in ***Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2010] FCA 690.*** I accept and adopt the

findings of law by His Honour Justice McKerracher relating to the issues of the effect of Article 27 of the ICCPR has on the domestic law of Australia.

68. I accept the submissions of the FMG in respect to ground 10 of the objection to the application for the M and the L's. The submission by YAC the protection of sites in accordance with the laws and customs of the Yindjibarndi People is itself a religious observance and one that will not be adequately protected by the provisions of the AHA as that Act is directed to the protection of sites which ought to be preserved on behalf of the Western Australian community and is not directed to the preservation of religious ceremonies and rituals associated with such sites is rejected. The affidavit of Mr Woodley and the submissions on behalf of YAC discloses in detail sacred beliefs, rituals and ceremonies associated with aboriginal culture and custom that is, or has been, carried out in various places of importance throughout Yindjibarndi country by Yindjibarndi People.

69. I find upon the evidence, whether the descriptions by Mr Woodley in his affidavit is characterised as being a religion observance or sacred beliefs, rituals and ceremonial usages associated with the culture and custom of importance throughout Yindjibarndi country by the Yindjibarndi People it does not detract from the fact the AHA does provide protection to any places and/or objects that are evaluated by the ACMC to be of significance.

70. The functions of the ACMC are contained in s. 39 of the AHA that states :

"**39. Functions of the Committee**

a) The functions of the Committee are –

a) to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons;

b) where appropriate, to record and preserve the traditional Aboriginal lore related to such places and objects;

c) to recommend to the Minister places and objects which, in the opinion of the Committee, are, or have been, of special significance to persons of Aboriginal descent and should be preserved, acquired and managed by the Minister;

d) deleted

e) to advise the Minister on any question referred to the Committee, and generally on any matter related to the objects and purposes of this Act;

ea) to perform the functions allocated to the Committee by this Act; and

f) to advise the Minister when requested to do so as to the apportionment and application of moneys available for the administration of this Act.

(2) In evaluating the importance of places and objects the Committee shall have regard to –

(a) any existing use or significance attributed did under relevant Aboriginal custom;

(b) any form or reputed use or significance which may be attributed upon the basis of tradition, historical association, or Aboriginal sentiment;

(c) any potential anthropological, archaeological or ethnographical interests; and

(d) aesthetic values.

(3) Associated sacred beliefs, and ritual or ceremonial usage, in so far as such matters can be ascertained, shall be regarded as the primary considerations to be taken into account in the evaluation of any place or object for the purposes of this Act."

69. The provisions of s. 39(3) of the AHA requires the ACMC to do precisely what the YAC submits the AHA will not do, that is to evaluate sites and/or objects of significance and importance in Yindjibarndi country by consideration of the sacred beliefs, and rituals or ceremonial usages held by Yindjibarndi People and where necessary to refer those matters to the responsible Minister for the making of orders to protect those sites and/or objects.

70. Section 18 of the AHA also provides a means by which persons who wish to exercise any rights they hold in the land on which Aboriginal sites and/or objects may seek evaluation by the ACMC of land on which an Aboriginal site may exist. That section further provides for the Minister to authorise the use of the land or refuse to allow the land to be use. In either event the person aggrieved by the decision of the Minister has a right of appeal.

71 I agree with the submission by FMG that neither the Mining Act, AHA or Native Title Act creates any right of veto to the grant of a mining tenement or the imposition of any particular condition that may be imposed on the grant of a mining tenement to any person or group of persons who hold any interest in the land. I also agree if that was the intention of any of those Acts then no other matters of public interest would be of any concern to the court or the

Minister. Such a situation, if it were to exist would not be in the public interest.

72. There has been no evidence produced that satisfies me the ICCPR has been adopted into the laws of the state of Western Australia that obliges me to have consideration to its covenants. Accordingly, I do not accept that the ICCPR has any application to the operation of the Mining Act and Regulations or the AHA.

73. In any event, if I am wrong, I do not consider upon the evidence, the provisions of either the Mining Act, relevant to either the M or the L's, or for that matter the AHA has been enacted with the purpose of preventing the Yindjibarndi People from freely carrying out their sacred beliefs, and rituals or ceremonial usages be they characterised as religious observances or beliefs. To the contrary, the rights that may be created by the grant of either or both the M or the L's under the Mining Act is subject to compliance with the provisions of the AHA, the Native Title Act and various other Acts. The intention of the AHA is to identify and evaluate sites and/or places and objects of significance, in this case, in Yindjibarndi country by consideration of the sacred beliefs, and rituals or customary usages of the Yindjibarndi People and when deemed necessary seek the protection of those sites and/or objects by the Minister.

74. In addition any recommendation for the grant of the M by the Minister and any grant of the L's may provide for such conditions considered reasonable by the warden. FMG proposes various conditions be imposed that will allow the claimants in Native Title Claim WC 03/3 some access rights, subject to safety requirements, to the ground the subject of the applications for the M and the L's.

75. When viewed objectively, I do not accept that any of the grounds of objection raised by YAC are such that they would excite the interest of the Minister pursuant to s. 111A of the Mining Act as described by His Honour Justice Franklyn in ***Re: Warden Heaney (ibid)*** at page 25. In fact I find upon the evidence of the affidavit evidence tendered to the court by witnesses for FMG it is in the public interest that the applications for the M and the L's be recommended for grant and granted respectively with the intention of advancing the Solomon Project by FMG.

76. I am also satisfied upon the evidence the applications for the L's are directly related to mining operations to be conducted upon granted mining leases 47/1409 and 1411.

77. I note application for M 47/1453 and application for L 47/361 both comply with the provisions of the Mining Act and the Native Title Act. However, applications for L 47/350, 367 & 368 have not been dealt with under the provisions of s. the Native Title Act.

78. I intend to recommend to the Honourable Minister that application for M 47/1453 be granted subject to the imposition of reasonable conditions. I intend to grant to FMG application for L 47/361 subject to the imposition of reasonable conditions. I intend to adjourn the applications for L's 47/350, 367 & 368 to allow the provisions of s. 24MD (6B) (c) to (g) the Native Title Act to be dealt with.

79. In respect to applications for M 47/1453 and L 47/361, I note that FMG have submitted various proposed conditions that may be imposed as part of the recommendation to the Minister and the grant respectively. YAC has not made submissions in respect to the appropriateness of those conditions. Given the length of time YAC has been on notice by FMG of those proposed conditions I intend to give YAC a short time to provide its written response. I shall equally allow a short time for FMG to reply in writing. At the conclusion I shall then consider the submissions by FMG and YAC and forward my recommendation to the Honourable Minister to grant M 47/1453 on conditions and I shall grant L 47/361 on conditions.

80. Accordingly, I make the following orders:

- Within 7 days of this order, YAC do file and serve on FMG any written response to the proposed conditions and endorsements to be imposed on application for M 47/1453 and L 47/361.
- Within 7 days thereafter FMG file and serve any submissions in reply to the submissions of YAC to the proposed conditions and endorsements on applications for M 47/1453 and L 47/ 361.
- Upon receipt of any submissions of YAC and any reply by FMG on the proposed conditions and endorsements the warden shall, on the papers and in chambers, make his recommendation to the Honourable Minister in respect to application for M 47/1453 and any conditions or endorsements to be imposed thereto and grant application for L 47/361 with any conditions or endorsements.
- Applications for L 47/ 350, 367 & 368 are adjourned to allow the procedures under s. 24MD (6B) (c) to (g) of the

Native Title Act 1993 (Cth) to be followed with liberty to apply to relist on 72 hours notice.