



Your Mine or Mine?

Striking the balance between development and culture

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1 ACKNOWLEDGEMENTS	2
2 ABSTRACT	6
3 BACKGROUND.....	6
3.1 RESOURCE DEVELOPMENT IN WESTERN AUSTRALIA	6
3.2 DEVELOPMENT VERSUS CULTURE	7
4 PARTIES TO THE AGREEMENT	8
4.1 MIDWEST CORPORATION LTD (“MIDWEST”)	8
4.1.1 MIDWEST’S INTERESTS IN THE WELD RANGES	8
4.1.2 MINING POTENTIAL OF THE WELD RANGES	9
4.2 YAMATJI LAND AND SEA COUNCIL (YLSC).....	9
4.3 THE WAJARRI YAMATJI PEOPLE.....	10
4.3.1 WAJARRI YAMATJI NATIVE TITLE CLAIM BOUNDARY	11
4.3.2 HISTORY OF THE WAJARRI YAMATJI PEOPLE	11
5 WELD RANGES	12
5.1 LOCATION.....	12
5.2 CULTURAL SIGNIFICANCE	12
5.2.1 SIGNIFICANT SITES – WILGIE MIA.....	13
5.2.2 MYTHOLOGICAL SIGNIFICANCE OF THE WELD RANGES AND WILGIE MIA.....	14
5.2.3 SONGLINES.....	15
5.2.4 SIGNIFICANCE OF THE WELD RANGE TO OTHER ABORIGINAL GROUPS	15
5.2.5 CONDITION OF THE SITES	16
6 THE PLAYING FIELD.....	17
6.1.1 MIDWEST’S TENEMENTS	17
6.2 GRANTED TENEMENTS	18
6.2.1 THE GRANTED TENEMENTS WERE NOT PROSPECTIVE	18

6.2.2 BREACHING THE AHA AND BAD PUBLICITY	18
6.2.3 MIDWEST’S STRATEGY	19
6.3 UNGRANTED TENEMENTS.....	20
6.3.1 THE EXPEDITED PROCEDURE.....	21
6.3.2 SECTION 29 NOTICES	22
6.3.3 OBJECTING TO THE EXPEDITED PROCEDURE.....	22
6.3.4 YLSC’S OBJECTIONS	23
<u>7 CONDUCT OF NEGOTIATIONS.....</u>	<u>23</u>
7.1 MIDWEST’S INITIAL PROPOSAL	23
7.2 WAJARRI YAMATJI’S INITIAL STANDPOINT	24
7.3 WAJARRI YAMATJI’S SECOND PROPOSAL	24
7.4 INQUIRY	25
7.5 MIDWEST’S FINAL POSITION	25
7.6 INVOLVEMENT OF THE NNTT	25
<u>8 BEHIND THE SCENES</u>	<u>27</u>
8.1 PREPARATION AND RESEARCH	28
8.2 OBJECTIONS UNDER THE MINING ACT 1978 (WA).....	29
8.2.1 PUBLIC INTEREST OBJECTIONS.....	29
8.3 ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984 (CTH)	30
8.4 REGISTRATION ON THE NATIONAL ESTATE.....	31
8.5 MEDIA	31
<u>9 THE TURNING POINT AND RESOLUTION.....</u>	<u>32</u>
9.1 COMPANY’S ACCEPTANCE OF THE LEGITIMACY OF WAJARRI YAMATJI’S CONCERNS	33
<u>10 HIGHLIGHTS OF THE FINAL AGREEMENT</u>	<u>34</u>
10.1 AVOIDANCE AREAS	34
10.2 MINING AGREEMENT.....	34

10.3 MONITORS AND LIAISON OFFICERS	34
10.4 FINANCIAL PACKAGE: COMPENSATION, TRAINING FUNDS AND SHARES IN COMPANY	35
<u>11 CONCLUSION</u>	<u>35</u>
<u>BIBLIOGRAPHY</u>	<u>37</u>
11.1 CASES	38

2 Abstract

When Midwest Corporation decided to develop a major exploration project in the same area as the world's oldest mine, a site of great cultural significance for Aboriginal people across Australia, conflict was inevitable. Animosity between the two parties was exacerbated by the fact that Midwest Corporation was strongly associated with a corporation (Kingstream) that had a negative history of dealings with native title groups, and also that the traditional owners had recently been disappointed by an apparent "win-win" agreement that ultimately failed to protect one of their major sites as promised.

Notwithstanding these obstacles, on the 19th of April 2006 the Wajarri Yamatji Working Group passed a resolution endorsing the "Weld Range Wajarri Yamatji Exploration Agreement" with Midwest Corporation Ltd. The Agreement contains significant advantages for the Wajarri Yamatji, with Midwest effectively forgoing reliance on its legal rights and adopting a more flexible and cooperative position. A key element of the Agreement is "Avoidance Areas", which are culturally significant areas where the Company has agreed not to explore or mine at all.

It is interesting and instructive for future negotiations to explore how two parties, initially at loggerheads and steeped in a relationship of deep distrust, came to produce one of the most comprehensive exploration agreements in Australia.

3 Background

3.1 Resource Development in Western Australia

The mining industry is booming in Western Australia. Statistics from the Department of Industry and Resources (DoIR) indicate that the value of Western Australian petroleum and mineral resources rose by 37 per cent to reach \$38.9 billion in 2005. The rise is mainly attributable to the significant increases in the petroleum and iron ore sectors (37 and 83 per cent respectively). 244 million tonnes of iron ore were sold in 2005 and with

the planned mine and port expansions, price rises and continued strong demand, it is expected that the iron ore sector will continue to grow¹.

China is Australia's biggest iron ore buyer and has demonstrated great interest in the Western Australian mining industry. Particularly relevant for this discussion is the joint venture that Sinosteel Corp, China's second largest iron ore trader, has entered into with Midwest Corp for the \$1.5 billion development of the Weld Range hematite and Koolanooka magnetite projects in the Mid-West region².

3.2 Development versus Culture

The issue of where Aboriginal people fit into this frenetic picture is a complex and changeable one and Native Title Representative Bodies are at the forefront of the action. In light of the great mineral wealth in Western Australia, mining companies are continuing to encroach upon traditional Aboriginal lands. With varied success, Aboriginal groups have been able to protect their cultural heritage by utilising their limited procedural rights under native title legislation. More often than not however, Aboriginal people find themselves in a disadvantaged position when it comes to negotiating with large and powerful mining corporations. The Howard government's 1998 reforms to the *Native Title Act 1993* (Cth) ('NTA') which reduced the procedural rights of native title parties (in particular the right to negotiate) have also been particularly damaging for native title parties³. Their position is also exacerbated by the fact that Native Title Representative Bodies are greatly under-resourced and under-funded.

Notwithstanding such difficulties, this paper recognises a recent example of where a Native Title Representative Body successfully facilitated Aboriginal people retaining

¹ "Western Australia's Resources Industry Experiences Record Breaking Year", *Department of Industry and Resources*, http://www.doir.wa.gov.au/documents/mineralsandpetroleum/Pre-release_2005.doc (accessed 4th May 2006)

² Midwest Corporation Ltd / Sinosteel joint media release, 18 October 2005.
<http://www.midwestcorp.com.au/pdf/ASX%20Announcement%20Studies%20JV%20with%20Sinosteel%2018%20Oct%202005.pdf> (accessed 5th May 2006)

³ Nettheim. G., "The Search for Certainty and the *Native Title Amendment Act 1998* (Cth)", 1999, 22(2), *University of New South Wales Law Journal*, p. 573-574.

control over exploration and mining activities on their traditional lands. Significantly (and surprisingly), the relationship that currently exists between the parties is genuinely amiable and respectful, a far cry from what was initially imagined.

4 Parties to the Agreement

4.1 *Midwest Corporation Ltd (“Midwest”)*

Midwest Corporation Ltd is a mining and exploration company that was first listed on the ASX on 1st May 2005. The company was formed from the remnants of Kingstream Steel Ltd (“Kingstream”) which owned a large numbers of iron ore tenements in the Western Australian Midwest region during the 1990s and earlier⁴. Kingstream’s plans for a major iron and steel project in the Midwest never came to fruition with the company going into administration in late 2000. Kingstream’s shady dealings with Aboriginal groups at the time are well documented and most notably in the ABC Four Corners program ‘Secret White Men’s Business’⁵.

Midwest has gone to considerable lengths to distance itself from Kingstream. Midwest’s promotional material contends that a change of ownership and management created a radically different entity which was significantly more open and transparent. The Wajarri Yamatji have been understandably skeptical about such contentions after many years of negative mining experiences on their land.

4.1.1 Midwest’s interests in the Weld Ranges

From its inception Midwest acquired a large number of Kingstream’s tenements in the Midwest area, including tenements in Koolanooka and Blue Hills, New Forrest, Jack Hills, Robinson Range and the Weld Ranges. Midwest have also acquired new mining and exploration tenements and are in the process of acquiring more. While Midwest has a

⁴ The Chairman of Kingstream was the then West Australian Premier’s brother Ken Court.

⁵ ABC Four Corners, Secret White Mens Business, 20 March 2000. transcript available at <<http://www.abc.net.au/4corners/stories/s111958.htm>> (accessed 20th May 2006)

number of projects, the Weld Range project is their most ambitious and lucrative⁶. In their 2005 Financial Report, Midwest have highlighted the signing of the joint venture agreement with Sinosteel Corporation for the development of the Company's Weld Range Haematite and Koolanooka and Magnetite projects as one of their main achievements.

In addition to its own tenements, Midwest has either entered into or is investigating joint venture arrangements and reciprocal exploration agreements with a number of other smaller companies with tenement holdings in the Weld Ranges. For example Midwest has an agreement with Hampton Hill, a gold and base metals exploration company, which allows it to explore for iron ore on Hampton's tenements. Midwest can earn a sixty percent stake in the iron ore rights by conducting a minimum of 2500m of drilling within 12 months. In exchange, Hampton Hill can explore for non ferrous metals on Midwest's tenements⁷. This arrangement greatly increases Midwest's reach within the Weld Ranges.

4.1.2 Mining Potential of the Weld Ranges

The iron ore potential of the Weld Ranges has been recognised for over 100 years. Exploration programs conducted since 1959 have identified a number of deposits in the Madoonga and Beebyn areas. The total mineral resource currently identified in the Madoonga deposit is 132.1 million tonnes of iron ore with grades of up to 65 per cent iron⁸. Midwest are hopeful that the Weld Ranges may contain some 400 to 500 million tonnes of ore and anticipate that optimum development of the resource will involve shipping fifteen to twenty million tones per annum. This will require the construction of a dedicated rail link between the Weld Range and the proposed Oakajee port north of Geraldton.

⁶ Midwest Corporation Ltd Company, *Financial Report*, December 2005, p. 3.

⁷ ASX Announcement, "Hampton Hill Mining NL Transaction", 27 June 2005, p.1.

⁸ Midwest Corporation Ltd Website, "The Weld Range Iron Ore Project": <http://www.midwestcorp.com.au/WeldRange.html> (accessed 4th May 2006)

4.2 Yamatji Land and Sea Council (YLSC)

Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (YMBBMAC) is the Native Title Representative Body (NTRB) for native title claims in the Pilbara, Murchison and Gascoyne areas of Western Australia⁹.

The organisation has two divisions: the Pilbara Native Title Service (PNTS) and the Yamatji Land and Sea Council (YLSC). YMBBMAC has a representative area of almost one million square kilometers and acts for a total of 30 native title claims, including the Wajarri Yamatji native title claim (WAG 6033 of 1998)¹⁰.

YMBBMAC operates under the *Native Title Act 1993* and is incorporated under the *Aboriginal Councils and Associations Act 1976*. It was first recognised as a native title representative body for the Yamatji region in December 1994. In 2000, it became the sole NTRB for the Yamatji region and in the same year it assumed responsibility as the NTRB in the Pilbara region¹¹.



4.3 The Wajarri Yamatji People

The Wajarri group is the largest in the Murchison and Gascoyne regions and their influence has been extending throughout the region prior to white settlement¹². There are many accounts of the Wajarri people in the ethno historical material that locates them

⁹ Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation website: <http://www.yamatji.org.au> (accessed 27th April 2006)

¹⁰ Ibid.

¹¹ Ibid.

¹² Napier, K., “*Wajarri Ethno Historical Research*”, Confidential Report Prepared for Mr Michael Robinson, Consultant Anthropologist, 2006.

across a large area of country: as far west as Northampton, as far north as Mt Augustus, as far east as Meekatharra and as far south as Mullewa¹³.

Tindale argues that one of the reasons that the Wajarri were such a large and dominant group in the area was because they discovered a seed near the Weld Ranges that could be stored for months in kangaroo skin bags, allowing them to store food in seasons of scarce resources¹⁴.

4.3.1 Wajarri Yamatji Native Title Claim Boundary

The Weld Ranges falls within the heartland of the Wajarri Yamatji claim area and is one of the most culturally significant areas within the claim. The Wajarri Yamatji Native Title Determination Application was lodged with the Federal Court in 1998 (WAG 6033 of 1998). It is the combination of a number of smaller Wajarri claims representing particular directional sub-groups, the last being in October 2005, when the Wajarri Elders native title claim group and the Ngoonooru Wajarri native title claim group combined and were registered as one claim – the Wajarri Yamatji Native Title claim.

The Wajarri Yamatji claim is located in the Central Gascoyne area west of Meekatharra, north east of Geraldton and east of Gascoyne Junction¹⁵. The claim is the largest within the Yamatji and Pilbara areas covering some 100,000 square kilometers within the shires of Chapman Valley, Cue, Meekatharra, Mount Magnet, Mullewa, Murchison, Northampton, Upper Gascoyne and Yalgoo.

4.3.2 History of the Wajarri Yamatji people

The impact of colonisation on Aboriginal people in the area has been significant. Agriculture, legislation, mining and disease have greatly impacted upon the Wajarri people, with disease decimating the mid-west Aboriginal population in the late 1800s and legislation restricting and imprisoning Aboriginal people. Agriculture had a profound impact on the Wajarri people in particular, who were employed in large numbers to work on various pastoral leases located in their traditional country. For many of the Wajarri

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

people, this form of employment allowed them to remain on their traditional land and, in many cases, to continue carrying out traditional ceremonies such as corroborees, and traditional activities such as hunting and collecting bush tucker¹⁶. Many Wajarri people still live within the claim area either on Wajarri communities such as Burringurrah at Mt Augusta and Pia Aboriginal Reserve which is an old Aboriginal meeting place¹⁷, or on Aboriginal owned pastoral stations, as well as in adjoining towns such as Cue, Meekatharra, Yalgoo, Mt Magnet and Mullewa.

5 Weld Ranges

5.1 Location

The Weld Range is approximately sixty kilometers north-west of Cue. It consists of a series of roughly parallel hills and ridges of banded iron formation with valleys between that extend up to sixty kilometers running from the-south west to the north-east and up to four kilometers wide¹⁸.

As the traditional owners of the Weld Range area, the Wajarri Yamatji people are responsible for caring for and protecting this part of the country¹⁹. They have accessed the Weld Ranges since time immemorial and continue to visit the area to collect ochre, bush foods, medicines, and teach children about their laws and culture²⁰.

5.2 Cultural Significance

The significance of the Weld Range is widely documented in historical and anthropological literature. In the native title context it has also been established through a number of NNTT expedited procedure objection inquiry matters that were successfully prosecuted by the YLSC on behalf of Wajarri people. In those inquiries it was established

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Hamlett, C., Wajarri Yamatji applicant, 2005, *pers. Comm.* 22 July 2005.

that the Weld Range was a “site rich” area which did not attract the expedited procedure²¹.

The Wajarri claim area is resource rich and consequently has a high level of future activity. As a recommendation from the 2001 “Technical Taskforce on Mineral Title Applications”²², a Heritage Protection Working Group was established for the Yamatji and Pilbara region. The Working Group met in 2002 and 2003 and comprised of representatives from the resource industry, YLSC and the Government. The Working Group developed a “Standard Heritage Agreement” (SHA) to be used in the Yamatji and Pilbara regions. Whilst the agreement is currently accepted by most claimants in the region for most exploration activity it was recognized by the Working Group that there were some areas - the Weld Ranges being specifically referenced - where a standardised form agreement would not be suitable due to their exceptional cultural significance.

5.2.1 Significant Sites – Wilgie Mia

There are an extensive number of significant sites scattered throughout the Weld Ranges²³, including some of the largest and most important ceremonial areas in the Murchison area. The most prominent site of both national and international significance is Wilgie Mia, an indigenous ochre mine and mythological site²⁴.

The mine consists of a large open cavern which then turns into a series of deeply excavated sub-horizontal tunnels that have been dug by hand along the strike of ochre veins. These tunnels are supported by a natural framework forming a crude “stop and pillar” method of ground support. It is a highly aesthetic but fragile structure. Historical and anthropological records attest to the enduring significance of Wilgie Mia, which is

²¹ *Robin Boddington and Others on behalf of the Wajarri Elders (WC01/3) (native title party) & The State of Western Australia (Government party) & Hampton Hill Mining NL (grantee party) NNTT Application Number: WO01/486; Robin Boddington and Others on behalf of the Wajarri Elders (native title party) & The State of Western Australia (Government party) & Richmond Resources Pty Ltd (grantee party) NNTT Application Number: WO02/87.*

²² Technical Taskforce on Mineral Tenements and Land Title Applications Final Report November 2001 < www.nativetitle.dpc.wa.gov.au/Home/MediaCentre/Publications/TT > (accessed 16th May 2006).

²³ Including the Wilgie Mia Bora Ground and Little Wilgie Mia.

²⁴ Wright, B.J., 1979, cited in Napier, K., Ibid.

believed to be the oldest mine in the world²⁵. Calculations based on how much ochre had been excavated at the time of contact suggest that Wilgie Mia is more than 27,000 years old²⁶.

Red ochre (*pujurrpa*) from the mine has been used by Aboriginal people for decorating bodies, spears shields, and ceremonial implements, as well as for rock painting and artifacts²⁷. During ceremonies, bodies and hair were smeared with a mixture of grease and red ochre²⁸. This act was imbued with ritual and sacred significance as the red ochre symbolized the “metamorphosed blood” of Dreaming ancestral spirits, such as the mythical *marlu* (red kangaroo)²⁹. In a metaphysical sense, red ochre and blood are the same substance, and it was seen as an extremely potent source of strength and courage³⁰.



5.2.2 Mythological significance of the Weld Ranges and Wilgie Mia

There is a strong association between red ochre from the mine and the blood of the *marlu* so not surprisingly, there are myths that connect Wilgie Mia with the mythical *marlu*. The Wajarri myth tells of an injured *marlu* that traveled east through the Murchison forming red ochre deposits where he bled³¹. According to Kingsford, one red ochre deposit was

²⁵ Prause, O., 1994, cited in Napier, K., Ibid..

²⁶ Napier, K., “The Cultural Significance of the Weld Range and Wilgie Mia to Aboriginal People”, Unpublished, Confidential Report, Yamatji Land and Sea Council, 2005.

²⁷ Kretchmar, W.H., 1936 cited in Napier, K., Ibid, p. 10.

²⁸ Oldfield, A., 1965, cited in Napier, K., Ibid, p. 11.

²⁹ Kingsford, R., 1982, cited in Napier, K., Ibid, p. 11.

³⁰ Sackett, L., 1977, cited in Napier, K., Ibid, p. 11.

³¹ Kingsford, R., 1982, cited in Napier, K., Ibid, p. 12.

made on Twin Peaks Station, and another on Mt Barloweerie (Pia Wadjari), and the final one was made at Wilgie Mia where the *marlu* bled to death.

There are many versions of the myth associated with Wilgie Mia. One alternative version is that Wilgie Mia was created when Mondong, the great hunter from the Dreamtime, speared a giant kangaroo which leapt and landed on the “sun side” of the range. As it thrashed about it dug out a big cavern into which its blood spilled and turned into red ochre and its bile yellow and green ochre³².

There are similarities between the different versions of the myth. This is because the myths relate to the same tract of country, and have been narrated by Wajarri Yamatji. In a sense, the myths serve to explain the boundaries of Wajarri territory to outsiders and to reinforce their traditional connection to particular sites within that territory³³.



5.2.3 Songlines

Songlines are the pathways or journeys that meander through the Aboriginal cultural landscape. Typically, they are journeys that ancestral beings made in the Dreamtime, and may crisscross large portions of Australia “connecting up” lots of different

“tribes”, who sing the songs of their own Dreaming track, which is a section of the Songline. Songlines can delineate the start and finish of a particular group’s country. At the boundary, the songs are handed over to the next group which sings their section of the songline³⁴.

³² Napier, K., Ibid, p. 12.

³³ Napier, K., Ibid, p. 13.

³⁴ Ibid.

The preservation of the Weld Range is critical to maintaining the cultural identity of the Wajarri Yamatji people by protecting evidence of stories and songlines. The Weld Range helps keep the Dreaming stories and songs “alive” and the features of the landscape can act as focal reference points that are important to traditional ceremonies such as initiation ceremonies³⁵.

5.2.4 Significance of the Weld Range to other Aboriginal Groups

Importantly, the Weld Range area is of great significance to Aboriginal groups throughout Australia. Aboriginal people traditionally came from all over Western Australia to camp and participate in corroborees and ceremonies in the Weld Ranges.



For example the Nanda people have a dreaming track about a rock kangaroo that runs from the west coast inland to Wilgie Mia. The Badimia people have another story that goes from their country north to Weld Range³⁶. The Wunmulla (Western Desert) and Jigalong (Pilbara) mobs have songlines that run west and south

respectively connecting to the Weld Range. The Wunmulla people have a myth that runs through the Weld Ranges is about a woman who was being chased by two men.³⁷

In addition to the mythological significance of the Weld Ranges for other Aboriginal groups, ochre from the Wilgie Mia mine has been used as a form of currency for thousands of years across Australia³⁸ and may have been found as far away as

³⁵ Ibid.

³⁶ Percy George, informant.

³⁷ Sunshine Williams; informant.

³⁸ Davidson, D.S., 1952. ‘Notes on the pictographs and petroglyphs of Western Australia and a discussion on their affinities with appearances elsewhere on the continent’, *Proceedings of the American Philosophical Society*, 96, p. 81.

Queensland³⁹. Other tribes were permitted to mine ochre from Wilgie Mia as long as they sought approval from owners who were responsible for the site⁴⁰.

5.2.5 Condition of the Sites

Unfortunately, mining activities in the past have damaged some areas of the Weld Ranges. In particular some of the original features of Wilgie Mia have been damaged by the use of explosives during contemporary mining for ochre the mid 1900s⁴¹. Archaeologists have also observed damage caused by miners bulldozing access roads to the mine.

6 The Playing Field

This section sets out the framework within which negotiations between the Wajarri Yamatji and Midwest were conducted and includes a summary of the various legal (and other) avenues YLSC investigated in order to help the Wajarri Yamatji protect their interests.

6.1.1 Midwest's Tenements

Midwest holds a variety of tenures in the Weld Ranges project area including granted and ungranted tenements. The *granted* tenements include:

- one Exploration License (tenement number E20/176)
- two Mining Leases (tenement numbers M20/402 and M20/403)
- one Temporary Reserve (tenement number TR70/3902)

The *ungranted* tenements include:

- four exploration licenses (E20/457, E20/459, E20/492, E20/595 & E20/907).
- one mining lease (M20/419)

³⁹ Colin Hamlett, informant.

⁴⁰ Napier, K., "The Cultural Significance of the Weld Range and Wilgie Mia to Aboriginal People", Ibid, p. 19.

⁴¹ Higgins, G.A. to the Superintendent of Native Welfare, 28 May 1969, AAPA file 4/6.

As mentioned above, Midwest also have reciprocal rights to explore on Hampton Hill's tenements and Midwest is currently undertaking negotiations with other mining companies regarding reciprocal exploration activities.

6.2 Granted Tenements

Midwest obtained a series of granted mining tenements from Kingstream that were not future acts because they were granted *before* Native Title and therefore do not attract the procedural rights set out under the NTA. With regard to those granted tenements, the Wajarri Yamatji have neither a right to negotiate under section 31 nor a right to object to the expedited procedure under section 32.

Midwest consequently retained the right to explore and mine on these granted tenements. While this *appeared* to deliver a significant advantage to Midwest (because those tenements were devoid of any native title 'impediment' to immediate access) the granted tenements actually turned out to be more of a *burden* than an asset. The reasons for this are explained below.

6.2.1 The Granted tenements were not prospective

The granted mining leases were not prospective enough to mine on their own⁴². It was necessary for Midwest to conduct further exploration activities to determine where the main reserve was located. Once this was determined, Midwest would need to acquire mining leases under the *Mining Act 1972* (WA). Those leases would be subject to the right to negotiate.

6.2.2 Breaching the AHA and bad Publicity

Secondly, even though Midwest were legally entitled to access the land and conduct exploration activities if they wished, they still ran the risk of breaching section 17 of the *Aboriginal Heritage Act 1972* (WA) ("AHA") if they destroyed or damaged an

⁴² Apparently there was very little iron ore on the granted tenements. Had the main ore body fallen within those granted tenements, there was a real possibility that Midwest would not have come to an Agreement.

Aboriginal site while doing so⁴³. In light of the well-documented cultural significance of the Weld Range area, the risk of breaching the AHA was high. Further, Midwest were also concerned about the impact that bad publicity associated with a section 17 prosecution in such a sensitive area would have on the project.

Completing an Aboriginal Heritage Survey is the most effective defence to a section 17 prosecution. There was a risk that Midwest would try to complete a survey outside the working group process using Aboriginal people that had not been authorized by the Working Group. However YLSC notified the Company of the risk of breaching the AHA without completion of a heritage survey with the *appropriate* custodians. As the secret and sacred nature of sites within the Weld Range was well documented only those persons who had detailed tribal knowledge of the area would be qualified to conduct a reliable Aboriginal heritage survey.

6.2.3 Midwest's Strategy

Midwest's main prerogative was to commence exploration activities on the granted temporary reserve as soon as possible to confirm that the tenement was economical. As outlined previously, their objective was hampered by the need to conduct heritage surveys. Midwest placed pressure on the Wajarri Yamaji to conduct heritage surveys over the granted tenements.

YLSC responded by insisting that these tenements were outside the NNTT Inquiry and mediation process. There was no statutory procedure that required the Wajarri Yamaji to complete a survey or even to negotiate about conducting one. Midwest were consequently in the anomalous position of being unable to progress the matter of most concern to them *despite* having the legal right to do so. Midwest had the option of conducting an unauthorized survey over the area, but this would mean risking

⁴³ The purpose of the *Aboriginal Heritage Act 1972* (WA) is stated as being both to protect Aboriginal remains, relics and sites from undue interference, and to recognise the legitimate pursuit of Aboriginal customs and traditions. Under the AHA it is an offence for a person to excavate, destroy, damage or alter any Aboriginal site. However, a person may make an application to the Minister under section 18 for permission to damage sites. To apply, an owner of land must inform the Trustees of the Western Australian Museum (the "Trustees") if they wish to use land in a manner contrary to section 17 of the Act. The Minister must consider the recommendations of the Trustees and can either consent or decline consent to the proposed use of the land. Interestingly, in 2003 the Minister did not refuse any Section 18 applications and in 2004 only refused one application.

prosecution under the AHA and jeopardizing any future relationship with Wajarri Yamatji. A working and functional relationship with the Wajarri Yamatji would be essential should the tenements prove prospective and if such a relationship did not exist during the exploration stages, then negotiation over any mining project would prove extremely difficult.

Perhaps ironically, the tenements that appeared to be of significant advantage to Midwest proved to be their crucial weakness and Wajarri Yamatji's strongest bargaining tool.

6.3 *Ungranted Tenements*

Midwest possessed a number of tenements that were subject to the NTA, including both ungranted exploration and ungranted mining tenements. Midwest needed to ascertain the extent and location of the iron ore reserve to develop a viable mining project. Consequently, the NTA focus of negotiations was on Midwest's exploration tenure. Midwest had identified a series of exploration tenements (E20/457, E20/459, E20/492, E20/595 & E20/907) that it wished to proceed to grant.

It became apparent at an early stage in the proceedings that Midwest saw the NTA process (that attached to the *ungranted* tenements) as the vehicle by which it could drive the negotiation process. The procedure would require the Wajarri Yamatji to enter negotiations and help Midwest to achieve its real objective, which was to complete heritage surveys on the *granted* tenements.

6.3.1 The Expedited procedure

Section 32 of the NTA outlines the "expedited procedure". Ritter describes the term "expedited procedure" as a misnomer because the expression refers to an *absence* of procedure or, more specifically, the exemption of a tenement from the right to negotiate⁴⁴. Ritter argues that the expedited procedure system is implemented and interpreted by the National Native Title Tribunal Future Act Unit in a manner that disadvantages native title parties, and is more likely to deprive Aboriginal people of the

⁴⁴ Ritter, D., "A Sick Institution? Diagnosing the Future Act Unit of the National Native Title Tribunal", 7(2) *AILR* 2002, p. 1.

right to negotiate. He has suggested that for Aboriginal people, the application of the Expedited procedure may appear as

“no more than the latest in a long line of colonial euphemisms and is merely a coded way of the Government saying the resource interest does not have to talk to you about the grant of this tenement”⁴⁵.

The following figure illustrates the right to negotiate process.

Figure 1: The Expedited Procedure Process

6.3.2 Section 29 Notices

In accordance with the procedure outlined in Figure 1, the tenements in question were advertised by way of issue of s29 notices as required under the NTA 1993. Each s29 notice included a statement that the Government considered the tenement to be an act attracting the expedited procedure: s29(7); s32(1). As a matter of practice, the Western Australian government considers that all mineral exploration and prospecting licenses⁴⁶ to be acts that attract the expedited procedure.

6.3.3 Objecting to the expedited procedure

A Native Title Party has four months from the notification date to lodge an objection. If the Native Title Party does not lodge an objection, the act will be permitted without inviting submissions or negotiating with respect to the act: s32(2), s32(4). If the objection is lodged but not lifted, the NNTT will hold an Inquiry to determine whether the act attracts the expedited procedure. An act will attract the “expedited procedure” if the NNTT concludes that the act will not

- interfere directly with the carrying on of community or social activities; AND
- interfere with areas or sites of particular significance; AND
- will not involve major disturbance to any land or waters⁴⁷.

If, at the Inquiry, the NNTT determines that the act attracts the expedited procedure, the act may proceed without inviting submissions or negotiating with the native title party:

⁴⁶ It is interesting to note that prospecting licenses have a maximum area of 200 ha with a term of four year and permit the prospector to extract or disturb up to 500 tonnes of material from the ground. Exploration licenses allow for an area of a minimum of 286 ha up to a maximum of 19,700 ha with a term of 5 years which the Minister can extend: Ritter, D., “A Sick Institution? Diagnosing the Future Act Unit of the National Native Title Tribunal”, 7(2) *AILR* 2002, p. 3.

⁴⁷ Section 237 (a), (b) and (c) NTA respectively.

s32(4). If the expedited procedure does not apply, the full right to negotiate procedure will apply under s31(1) and s32(5).

6.3.4 YLSC's Objections

Prior to the development of the Standard Heritage Agreement (SHA), YLSC had standard instructions to lodge objections to the expedited procedure. If the claim group required a heritage survey to be completed over the application area then the objection would be lifted once the proponent agreed to conduct a heritage survey. The development of the SHA process largely obviated the need to lodge objections. However such instruction remained where:

1. the area affected was of considerable cultural heritage value; and/or
2. there were other issues of concern regarding the application requiring resolution prior to facilitating the grant of the tenement.

Both of these factors were relevant to Midwest's development in the Weld Ranges. The area was of major cultural significance and the size and complexity of the project meant that the situation fell outside the normal exploration licence application scenario. Moreover, the Wajarri Yamatji had given specific instructions in relation to the Weld Range to lodge objections to any applications within a 10 km radius of the Range and to invite the grantee party to attend a working group meeting to discuss their application. As a result YLSC lodged objections under s32(3) to each of the applications.

YLSC placed three objections on Midwest's Exploration License applications (NNTT objection numbers were WO03/613, WO01/519, and WO01/112).

7 Conduct of Negotiations

7.1 Midwest's initial proposal

Midwest Corporation attended several Wajarri Yamatji working group meetings between December 2004 and February 2005. At these meetings Midwest proposed that:

1. they would enter into a heritage agreement over the ungranted tenements;

2. they would agree to sign the SHA in relation to the granted tenements. Although Midwest would risk prosecution under the AHA if they commenced exploration activities without a heritage survey, they claimed that there was still no obligation for them to sign the SHA. Thus it appeared as though Midwest was making some sort of concession to the Wajarri Yamatji.

Midwest's proposal was unacceptable to the Wajarri Yamatji, who were already unwilling to negotiate over the area because of its great cultural significance. Midwest's hard-line and "rights based" approach only alienated them further.

7.2 Wajarri Yamatji's Initial standpoint

Initially, the Wajarri Yamatji Working Group was completely opposed to any mining and exploration activities in the Weld Ranges. Their initial instructions were to engage all legal avenues as well as any other strategies to prevent exploration or mining. However, in realising that development in the Weld Ranges was probably inevitable, the Wajarri Yamatji initially proposed that Midwest negotiate a comprehensive "whole of project" agreement to cover granted and ungranted mining and exploration tenements. Midwest was concerned at the delays that a complex "whole of project" agreement might entail. Moreover it appeared that Midwest trusted the strength of their legal rights and believed that Wajarri Yamatji would change their position.

7.3 Wajarri Yamatji's second proposal

Following these initial negotiations, YLSC and Wajarri Yamatji proposed that Midwest agree to the exploration tenement applications going into the Right to Negotiate by consent⁴⁸. The YLSC and Wajarri Yamatji argued that the widely recognised cultural sensitivity of the area and the complexity of the situation necessitated the full right to negotiate process. YLSC argued that Midwest would be more successful in achieving a

⁴⁸ This means that YLSC asked Midwest to request the NNTT to make a determination by consent that the expedited procedure did not apply, which would allow the applications to progress through the full right to negotiate process.

working and functional relationship with the Wajarri Yamatji if the full right to negotiate process was engaged.

7.4 Inquiry

Midwest rejected this proposal because of the apparent delays associated with adopting the negotiation process. Midwest referred the matter to Inquiry with the NNTT under s32(4). Midwest later acknowledged that this tactic was explicitly designed to increase the pressure on Wajarri Yamatji. The objective of Midwest's strategy was to force the matters to a hearing where it appeared Midwest was confident of victory. If the Inquiry was determined in Midwest's favour, the exploration tenements would be granted.

However, regardless of the outcome of the Inquiry, Midwest's overall objectives would not have been realized because they would still risk breaching s17 of the AHA if they did not conduct heritage surveys on the ungranted tenements. The outcome of the Inquiry would not bring Midwest any closer to reaching agreement for heritage surveys to be conducted on their primary target - the *granted* tenements.

7.5 Midwest's final position

Midwest appeared to adopt the demeanour of a "hard but fair" stance in negotiations. Essentially they used the Inquiry process to place pressure on the Wajarri Yamatji and force them into agreement, whilst continually reiterating their (apparent) willingness to negotiate. As their position was unacceptable to the Wajarri Yamatji, the YLSC sought to protect the interests of their clients by pursuing an interests-based position in negotiations.

7.6 Involvement of the NNTT

The exploration tenements were referred to mediation with the NNTT. Ritter has criticized the NNTT in disadvantaging native title parties in the negotiation process and his criticisms were evident in this case⁴⁹.

⁴⁹ Ritter, D., "A Sick Institution? Diagnosing the Future Act Unit of the National Native Title Tribunal", 7(2) *AILR* 2002.

This was demonstrated at the ‘on-country’ mediation meeting between the parties at Weld Ranges in August 2005, where negotiations were further derailed by the intrusive interference of the ‘independent’ mediator. In addition the native title consultant engaged by Midwest only served to increase the distance between the parties.

At the meeting, YLSC continued to argue that matters should be put into the right to negotiate by consent. While the Midwest principals appeared finally ready to accept this position, the intervention of their consultant obstructed any such concession. The consultant continued to reiterate Midwest’s original ‘offer,’ refusing any concession, leading to a stalemate from which only he would benefit.

The unbalanced process was greatly exacerbated by the intervention of the NNTT mediator. The mediator’s suggestion was for YLSC (on behalf of the Wajarri Yamatji) to agree to conduct heritage surveys on Midwest’s granted tenements in exchange for them agreeing to put the exploration applications in the right to negotiate. As these tenements were not part of the mediation process this proposal went well outside the scope of the mediation. Moreover, if adopted, it would have effectively removed any advantage that Wajarri Yamatji had in the negotiations, delivered the coveted tenements to the mining company, and removed any incentive for them to offer anything other than the most cursory concessions to the Wajarri Yamatji. The mediator’s proposal displayed a clear bias towards advancing the interests of the mining company.

YLSC responded by stating that the negotiations were in relation to the exploration applications, that this is what the Wajarri Yamatji wished to focus on and that YLSC had no instructions in relation to the granted tenements. If negotiations over the ungranted tenements went well and an acceptable agreement was reached, Wajarri Yamatji may then consider extending it to the granted tenements. YLSC also stated that there were additional concerns in relation to the granted tenements as these included a mining tenement and conducting a heritage survey would clear the way for mining – an issue of much greater concern and something that could not be addressed under the current negotiations.

8 Behind the scenes

While meetings and negotiations with Midwest continued, YLSC pursued a range of different strategies designed to create leverage for the Wajarri Yamatji. While the NTA provides very limited procedural rights and protections to native title claimants, YLSC has adopted a strategy of pursuing a much broader range of avenues to protect its clients' interests.

In August 2005, a meeting of Wajarri and other interested Aboriginal people was held "on-country" at the Weld Ranges. At this meeting the Wajarri people instructed YLSC to pursue a range of legal and other strategies against the Midwest tenements. From that meeting, the strategies to be investigated included:

1. preparing to take the exploration tenement matters to Inquiry;
2. filing and pursuing objections to Midwest's tenure under the *Mining Act 1978* (WA);
3. registration of Weld Range or parts thereof as an Aboriginal site under the AHA;
4. extending the protected area status of Wilgie Mia into the Weld Ranges;
5. using the protection offered by the Commonwealth *Aboriginal and Torres Strait Islander Heritage Act 1984*
6. registering the Weld Ranges on the National Estate;
7. using the media to promote the significance of the area and gather national and international interest in protection of the area.

Some of these approaches were ultimately rejected or implemented in slightly different formats. A summary of the strategies adopted is outlined below.

8.1 Preparation and Research

To effectively pursue objections under either the NTA or *Mining Act 1978* (WA), it was necessary to conduct research and preparation. Research included:

1. field trips to the Weld Range area with Elders. Field trips to the Weld Range were conducted during June and August 2005 with Elders, anthropologists and lawyers. Extensive documentary evidence was collected detailing the unique

- nature of the area, including information on the rich variety of flora and fauna in the area as well as information on cultural heritage;
2. interviews with Wajarri elders to collect stories about the cultural significance as well as Dreamtime stories of the area;
 3. extensive desktop research by an anthropologist into the historical significance of Wilgie Mia;
 4. an affidavit was requested from an archaeologist with experience investigating Aboriginal rock art in the area;
 5. research conducted by staff anthropologists with Elders from adjoining claim groups and other areas in Western Australia testifying to their connection to the area through songlines and stories.

8.2 Objections under the Mining Act 1978 (WA)

In the case of mining leases, the Warden may give anyone who has lodged a notice of objection an opportunity to be heard on an application for a mining lease. The Warden then makes a recommendation to the Minister as to whether or not the lease should be granted or refused: s75. However the Minister can grant or refuse the mining lease as the Minister thinks fit, irrespective of the Warden's recommendations: s75(6). Under section 111A of the *Mining Act 1978 (WA)*, the Minister may terminate an application for a mining tenement if the Minister is satisfied on reasonable grounds in the public interest that that the lease should not be granted.

8.2.1 Public Interest Objections

The Warden's court cases on mining leases demonstrate that the Warden has jurisdiction and wide discretion to make recommendations in relation to public interest matters. The cases illustrate that public interest objections may include matters relating to the environment, native title rights and interests, lifestyle issues and cultural heritage⁵⁰. These

⁵⁰ *Warden Calder; Ex parte Cable Sands* (1998) 20 WAR 343, *Re Warden Heaney, ex parte Seperntine Jarrahdale Ratepayers* (1997) 18 WAR 320, *Re Warden French ex parte Seperntine Jarrahdale Ratepayers* (1994) 11 WAR 315.

matters can all be taken into account by the Minister when he makes his decision under s111A or when the Minister decides not to grant a tenement under s75(6).

The Wajarri Yamatji submitted four objections on public interest grounds to Midwest's tenements under the *Mining Act 1978* (WA). These were objection numbers 11/045 to Mining Lease Application 20/500 and objection number 29/045 to Exploration License E20/595. Two smaller objections submitted recently were E20/633 and E20/635.

The argument presented by the YLSC was that the mining tenements would have a significant and detrimental impact on the *cultural heritage* of the Wajarri people. Field trips were conducted and affidavits prepared attesting to the abundance of sacred sites and artifacts in the Weld Range area. It was also argued that the mining leases would impact the *lifestyle* of the Wajarri people. Affidavit evidence was collected recording the activities undertaken by Wajarri people in the area such as the continued collection of medicinal flora and hunting. An argument was also made on the damaging impact that a mining lease would have on the *environment* of the Wajarri people, and in particular the irreparable environmental damage to sacred sites that would result from a mining grant. The mining grant would greatly increase the chance of desertification, irreparable loss of medicinal flora as well as negative impacts on the water table.

8.3 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*

The purpose of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is to preserve and protect areas and objects that are of particular significance to Aboriginal people from injury or desecration. The act was introduced to enable the Commonwealth to protect significant Aboriginal areas and sites when State or Territory law does not provide effective protection. Aborigines and Torres Strait Islanders can apply to the Minister for a declaration to protect an area or object which is under threat of injury or desecration. Declarations can be short or long term and criminal sanctions may result from breach⁵¹.

⁵¹ Evatt, E., "Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*", *Australian Indigenous Law Reporter*, 38, 1997.

The Commonwealth Act will only operate as a “safety net” where State legislation is inadequate to protect Aboriginal heritage⁵². The Commonwealth Act is not meant to “cover the field”, or exclude the operation of State or Territory laws. Rather, it operates concurrently with State legislation⁵³. Therefore, the Commonwealth Minister will only use the Commonwealth Act to protect sites as a last resort⁵⁴.

It was open to the YLSC and the Wajarri Yamatji Working Group to make an application for heritage protection under this statute. However before an application was lodged an agreement with Midwest had already been reached. It was, however, another avenue, *albeit* a much “weaker” one than the *Aboriginal Heritage Act 1972* (WA), to help protect the Wajarri Yamatji’s interests.

8.4 Registration on the National Estate

YLSC submitted an application to the Indigenous Heritage Program for funding. If successful, the funding will go towards employing a Project Officer to identify and record the cultural significance and Indigenous Heritage values of the Weld Ranges.

Funding for the project has been sought with the view to ultimately listing the Weld Range on the National Heritage List. When placed on this list, the Weld Ranges will be protected by the *Environment Protection and Biodiversity Conservation Act 1999*. This means that a person cannot take an action that has, will have or is likely to have, a significant impact on the national heritage values of a listed place without the approval of the Australian Government Minister for the Environment and Heritage. It is a criminal offence not to comply with this legislation⁵⁵. YLSC have yet to hear the results of this application and if successful we will now work with Midwest in the relation to the best way to progress this application.

⁵² *Tickner v Bropho* (1993) 114 ALR 409 per French J at 446-451.

⁵³ See Section 7.

⁵⁴ Saylor, D., “Aboriginal Cultural Heritage Protection in Western Australia: the Urgent Need for Protection”, *Aboriginal Law Bulletin*, Vol 3, No. 76, 1995, p. 1.

⁵⁵ Department of Environment and Heritage Website:
<<http://www.deh.gov.au/heritage/publications/factsheets/fact6.html>> (accessed 10th May 2006).

8.5 Media

The media is frequently used by the YLSC as a tool in the negotiation process, most commonly used when agreements are signed. However on occasion it is also used to influence negotiation outcomes through the management of public opinion. In these negotiations, the media proved to be a powerful tool.

In the last quarter of 2005, negotiations appeared to have broken down between Midwest and the Wajarri Yamatji. The claimant group was greatly concerned with the future of the Weld Ranges. A press release was issued to the national media conveying the concern felt by the traditional owners and outlining the enormous cultural and historic importance of the Weld Ranges which was potentially threatened by future activity proposed by the proponent.

YLSC then attempted to 'sell' the story to a number of national media outlets to heighten public interest in the potential threat that the proposed mining activity could have on the area.

However, by the time the story was picked up by a national print outlet, the nature of negotiations had improved and was at a very delicate stage. Rather than running a negative story about Midwest, YLSC elected to use the media in a more strategic way to foster the more positive relations that were emerging. Accordingly we suggested to *The Australian* that they focus on Wilgie Mia as an historic asset in the Midwest.

The story was run in January 2006, with a picture of Colin Hamlett (a prominent Wajarri Elder) and a positive message about the Weld Range. As a result of this story, there appeared to be an immediate improvement in the approach taken by the company towards negotiations.

Two joint media releases were issued concerning the signing of the agreement once it was reached. The first release concerned reaching the in-principle agreement and the second on the day of the signing. Both releases were drafted by Yamatji, with approval from Midwest Corporation.

9 The turning point and resolution

Negotiations between YLSC and Midwest Corporation continued whilst the “behind the scenes” avenues were explored. Midwest had avoided funding a Working Group meeting, opting instead to use the s150 mediation process with the NNTT to discuss issues with YLSC staff. During mediation with the NNTT, Midwest stated that they wanted to develop a comprehensive heritage agreement to be “recommended” to the working group. YLSC legal officers advised that while they could provide some assistance in this matter it was ultimately up to the Wajarri Yamatji to decide whether to adopt such an agreement. As negotiations continued, flexibility began to enter into the agreement. Midwest had reviewed its strategy deciding that all of its tenements would be subject to a single agreement. The major issues that emerged during the negotiations were:

1. concern over the future of the granted mining tenements;
2. avoidance areas (guaranteed protection for Wilgie Mia and other important sites);
3. the making of s16 or 18 applications under the AHA to destroy or damage sites⁵⁶.

These issues proved to be contentious and became the concentrated focus during the discussions. When a draft agreement had been reached (excluding agreement on the above points) Midwest finally agreed to meet with the Wajarri Yamatji.

There were a number of factors that were instrumental in reaching this turning point in negotiations, some of which are outlined below.

9.1 Company’s acceptance of the legitimacy of Wajarri Yamatji’s concerns

Midwest later acknowledged that a major turning point in the negotiation came when Midwest realised the Wajarri Yamatji were serious about the immense cultural significance of the area and also their intention to do what ever was necessary to protect it. The detailed material that was provided in response to the Warden’s Court objection also set out the factual basis of the Wajarri’s concerns. As Midwest began to

⁵⁶ A person may make an application to the Minister under section 18 of the AHA for permission to damage sites.

acknowledge the legitimacy of these concerns, the tenor of discussions shifted and points of agreement began to emerge.

Midwest were also frustrated by their inability to progress their exploration activities, *despite* the strength of their legal position. In light of the material supplied in the first Warden's court matter and the reality that many more objections were to come (each of which involve costly delays and expense), Midwest needed to re-evaluate their strategy. As Midwest began to alter its view of the situation and to engage with the concerns of the people through adopting an "interests based" rather than "rights based" approach, a way forward began to appear.

10 Highlights of the final Agreement

The "Weld Range Wajarri Yamatji Exploration Agreement" is considered to be one of the most significant exploration land access agreements ever reached in Australia. This section highlights some of the main benefits for the Wajarri Yamatji under the Agreement. There are other and more detailed benefits contained in the Agreement but they are subject to confidentiality requirements.

10.1 Avoidance Areas

Midwest has agreed not to undertake any activity, including any Exploration Activity or any Mining Activity, on any Avoidance Areas within the Weld Range. Avoidance Areas include the Wilgie Mia Reserve, all indigenous sites registered with the Department of Indigenous Affairs at the commencement date as well as any other Avoidance Areas identified and agreed after completion of the Heritage Surveys.

10.2 Mining Agreement

It was agreed that that the Agreement would relate only to exploration and that mining would be dealt with under a separate agreement. To this end Midwest has agreed that no mining activity will take place on any of its tenements until a Mining Agreement has been negotiated in good faith between the two parties.

10.3 Monitors and Liaison Officers

In accordance with the extensive Aboriginal Heritage Protocol, Midwest has agreed to engage two Wajarri Yamatji people to monitor any ground disturbing exploration. There is also the option for Monitors to receive training as field hands during the Exploration Activities.

Midwest has agreed to fund a liaison officer position from among the Wajarri Yamatji and, the parties have agreed to establish a Liaison Committee to monitor and coordinate the implementation of the Agreement. The Committee will have representatives from Midwest, the Wajarri Yamatji and YLSC.

10.4 Financial package: Compensation, training funds and Shares in company

Unlike most exploration agreements Midwest has agreed to include a compensation package as part of the Agreement. There is an annual provision of funds towards training and employment initiatives as well as compensation. The Wajarri Yamatji will also receive shares in the Company giving them a direct stake in the Company's operations. Provisions for compensation have not previously been included in any Exploration Agreement in the Yamatji region and only extremely rarely paid in other areas⁵⁷.

11 Conclusion

This paper illustrates some of the issues involved in striking the balance between development and culture as the mining industry continues to impact upon Aboriginal heritage and land. Mining developments are a continual threat to Aboriginal heritage and the rights that Aboriginal people have to protect their cultural heritage and further their interests as stakeholders under the existing legislation are often only procedural at best.

Notwithstanding these factors, the Agreement reached between the Wajarri Yamatji Working Group and Midwest Corporation in April this year underscores two things.

Firstly, even on this uneven playing field, Aboriginal communities in partnership with NTRBs can employ creative and strategic measures to negotiate real benefits for their

⁵⁷ Agreements, Treaties and Negotiated Settlements Project Website:
<<http://www.atns.net.au/biogs/A001018b.htm>> (accessed 20th May 2006)

communities. Secondly, for mining companies wanting to develop viable ongoing projects, the long term benefits of real engagement with the interests of native title parties and the formation of effective partnerships far outweigh any short term advantages gained by insisting on the enforcement of strict legal rights.

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