NATIONAL NATIVE TITLE TRIBUNAL

John Edward Telfer and Another v Raymond Ashwin and Others on behalf of the Wutha and Another **[2014] NNTTA 97 (3 October 2014)**

Application No: **WF2014/0008**

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

- and -

IN THE MATTER of an inquiry into a future act determination application

John Edward Telfer (grantee party/applicant)

- and -

Raymond Ashwin and Others on behalf of Wutha (WC1999/010) (first native title party)

- and -

Evelyn Gilla and Others on behalf of the Yugunga-Nya People (WC1999/046) (second native title party)

- and -

The State of Western Australia (Government party)

FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 3 October 2014

Catchwords: Native title – future act – no agreement with first native title party – application for determination for the grant of mining licence – s 39 criteria considered – determination that the act may be done

Legislation: *Native Title Act 1993* (Cth), ss 26D, 29, 30, 30A, 31, 35, 36, 38, 39, 109, 151, 237

Mining Act 1978 (WA), ss 57, 61, 63, 63AA, 66

Mining Regulations 1981 (WA), reg 20, 21, 23AB

Aboriginal Heritage Act 1972 (WA), ss 5, 17, 18, 62

Environmental Protection Act 1986 (WA)

Environmental Protection (Clearing of Native Vegetation) Regulations 2004 (WA), reg 5

Cases:

Adani Mining Pty Ltd/Jesse Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland [2013] NNTTA 30 (‘*Adani Mining v Diver*’)

Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thomson (Gugu Badhun)/State of Queensland [2006] NNTTA 3 (‘*Cameron v Hoolihan*’)

Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiraadjuri People (NC11/4)/State of New South Wales [2013] NNTTA 2 (‘*Coalpac v Gundungurra Tribal Council*’)

Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurruma and Pinikura People; Puutu Kunti Kurruma and Pinikura People #2/Western Australia [2011] NNTTA 80 (‘*Magnesium Resources v Puuntu Kunti Kurruma and Pinikura*’)

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

Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People; Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respective (Gubrun) families; Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwonjga) People [1998] NNTTA 2 (‘*Minister for Lands v Strickland*’)

Minister for Mines (WA) v Evans (1998) 163 FLR 274; [1998] NNTTA 5 (‘*Minister for Mines v Evans*’)

Peregrine Resources Pty Ltd and Another v Raymond Ashwin and Others on behalf of the Wutha and Another [2014] NNTTA 59 (‘*Peregrine Resources v Wutha*’)

Re Koara People (1996) 132 FLR 73; [1996] NNTTA 31 (‘*Re Koara People*’)

The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja/Western Australia [2006] NNTTA 19 (‘*The Griffin Coal Mining Co v Nyungar People*’)

Western Australia v Thomas (1996) 133 FLR 124; [1996] NNTTA 30 (‘*Western Australia v Thomas*’)

WMC Resources v Evans (1999) 163 FLR 333; [1999] NNTTA 522 (‘*WMC Resources v Evans*’)

Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd [2014] NNTTA 8 (‘*Yindjibarndi v FMG Pilbara*’)

Representative of the grantee party	Mr Darrell Higham, Cue Gold Pty Ltd
Representative of the first native title party	Mr Ron Harrington Smith
Representative of the second native title party	Mr Colin McKellar, Yamatji Marlpa Aboriginal Corporation
Representatives of the Government party	Mr Rod Wahl, State Solicitor’s Office Ms Sarah Power, State Solicitor’s Office Ms Laurie Lehmann-Bybyk, Department of Mines and Petroleum

REASONS FOR DECISION

Background

[1] On 22 October 2003, the State of Western Australia ('the Government party') gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act' or 'NTA') of its intention to grant mining licence M21/158 ('the proposed licence') under the *Mining Act 1978* (WA) ('*Mining Act*') to Joseph Sidney Cousier. On 6 January 2006 a transfer was registered with the Department of Mines and Petroleum changing the holder of the proposed licence from Joseph Sidney Cousier to John Edward Telfer. Therefore, for the purposes of this determination, the grantee party is John Edward Telfer.

[2] At the date of the notice and four months after the notification day, the following native title determination applications appeared on the Register of Native Title Claims with respect to the proposed licence:

- Raymond Ashwin and others on behalf of the Wutha people – WC1999/010, registered from 15 June 1999 ('the first native title party').

- Evelyn Gilla and others on behalf of the Yugugna-Nya People – WC1999/046, registered from 12 June 2000 ('the second native title party').

[3] Each of the native title parties is therefore a 'negotiation party' for the purposes of Part 2, Division 3, Subdivision P of the Act (ss 30(1) and 30A NTA).

[4] According to the s 29 notice, the grant of the proposed licence would authorise the grantee party to mine for minerals for a term of 21 years from the date of grant, with the right of renewal for 21 years. The notice also specifies the size of the proposed licence to be 9.74 hectares (approximately 0.097 square kilometres). The proposed licence is located in the Shire of Cue, approximately 26 kilometres south east of Cue, and is situated entirely within the claim boundaries of both the first and second native title party.

[5] Following the notification of the proposed licence, the Government party commenced negotiations with parties by letter dated 19 April 2004. Parties also attended a mediation convened by the National Native Title Tribunal ('the Tribunal'). Neither

negotiations between parties nor mediation assistance led to an agreement of the kind specified in s 31(1)(b) of the Act in relation to the first native title party.

The section 35 future act determination application

[6] On 3 April 2014, Cue Gold Pty Ltd, as agent for the grantee party, made an application to the Tribunal under s 35 of the Act for a determination under s 38. The application was made on the basis that the grantee party had not been able to reach agreement with the first native title party about the grant of the proposed licence within six months of the Government party giving notice of its intention to do the act. It is understood that the second native title party has entered into an agreement with the grantee party in relation to the proposed licence, and a Deed for Grant of Mining Tenement was executed and lodged with the Tribunal on 27 October 2010.

[7] On 10 April 2014, President Raelene Webb QC appointed me to constitute the Tribunal for the purpose of considering the s 35 application. I considered the conditions outlined in s 76 of the Act and subsequently accepted the application, pursuant to s 77 of the Act, on 1 May 2014.

[8] On 25 August 2014, the Tribunal received a letter from the first native title party which indicated it disputed a number of the paragraphs in the grantee party's s 35 application and stated that the future act determination application should be dismissed ('NTP's dismissal letter'). I note that the Tribunal's power to dismiss an application is outlined in the following sections of the NTA:

> **s 147 Power of Tribunal where a proceeding is frivolous or vexatious**
> The Tribunal may dismiss an application if, at any stage of an inquiry relating to the application, the Tribunal is satisfied that the application is frivolous or vexatious.
>
> **s 148 Power of Tribunal where no jurisdiction, failure to proceed etc.**
> The Tribunal may dismiss an application, at any stage of an inquiry relating to the application, if:
> (a) the Tribunal is satisfied that it is not entitled to deal with the application; or
> (b) the applicant fails within a reasonable time to proceed with the application or to comply with a direction by the Tribunal in relation to the application.
>
> **s 149 Power of Tribunal where applicant requests dismissal**
> The Tribunal may dismiss an application if:
> (a) the applicant requests, in writing, that the application be dismissed; and
> (b) the Tribunal is satisfied that it is appropriate to dismiss the application.

[9] Having considered the circumstances of this matter, I found that the Tribunal was entitled to deal with the application and it would not be appropriate to dismiss the matter. Parties were advised of this decision on 25 August 2014 and reminded of the compliance dates for submissions in the inquiry process.

The Inquiry

[10] If the native title party alleged that either the Government or grantee party's conduct had not been in good faith, the Tribunal would have to consider contentions and evidence on that issue. The Tribunal would then only have power to determine the substantive issue under s 39 of the Act if satisfied that the relevant party had negotiated in good faith. At the preliminary conference for the inquiry, held on 21 May 2014, the first native title party representative was unable to confirm if the first native title party would challenge whether the grantee party or Government party had negotiated in good faith (see ss 31(1)(b) and 36(2) of the Act). A due date was set for 18 June 2014 for those submissions, should the representative wish to lodge them – no submissions were received.

[11] On 25 June the Tribunal contacted all parties, indicating that no good faith submissions had been received, and the Tribunal intended to issue fresh directions for the substantive matter. No objection was received from any party in relation to this course of action, directions were amended to remove the compliance dates for the issue of good faith negotiations, and these new directions were issued on 27 June 2014.

[12] Following the preliminary conference, the Tribunal received no further correspondence or submissions from the first native title party or any other party on the question of good faith negotiations. Therefore, based on the evidence before me, I believe I have power to proceed with the inquiry.

[13] On 9 July 2014, directions were again amended at the request of the grantee party to allow an additional week in which to lodge grantee party submissions. Directions were amended a further and final time on 20 August 2014 to allow further time for the native tile party to provide submissions. These directions required the parties to provide contentions and documentary evidence relevant to the criteria in s 39 of the Act and also set dates for the hearing of the matter, should a hearing be required.

[14] The Government party provided a statement of contentions on 9 July 2014 ('GVP Contentions'), together with the following documents (I note that GVP7 was inadvertently left out, however, was subsequently provided by the Government party on 20 August 2014):

GVP1. Application for Mining Tenement relating to the proposed licence.

GVP2. Copy of the s 29 notice for the proposed licence.

GVP3. Initial negotiation letter from the Department of Mines and Petroleum ('DMP') to the grantee party and native title parties, dated 19 April 2004.

GVP4. A) Extract from the Register of Native Title Claims for the second native title party;

B) Extract from the Register of Native Title Claims for the first native title party.

GVP5. Letter to Native Title Registrar dated 27 October 2010 and enclosed Deed for Grant of Mining Tenement, executed by the Government party, grantee party and the second native title party.

GVP6. DMP Map of exploration licence E09/1959.

GVP7. DMP Map of mining licence M21/158.

GVP8. Tengraph Quick Appraisal for the proposed licence, dated 9 May 2014 [note this Quick Appraisal was replaced by one dated 24 September 2014, which recorded dead tenements as well as the current live tenements, and no party objected to this replacement].

GVP9. DMP draft endorsements and conditions to be attached to the proposed licence as at 9 May 2014.

GVP10. Search results of the Register of Aboriginal Sites for the proposed licence, dated 15 January 2014.

[15] The grantee party's submissions ('GP submissions') were provided on 17 July 2014 and consist of the following documents:

GP1. Cover letter.

GP2. Power of Attorney documents authorising Mr Darrell Redvers Higham to act on behalf of Mr John Edward Telfer in matters related to the proposed licence.

GP3. Copies of documents provided by the Government party (GVP6, 8-10).

GP4. Negotiation letter dated 14 November 2012 from Mr Higham, to Mr Paul Tolcon (who was then acting on behalf of the first native title party), with enclosed copy of the first native title party's draft deferred production agreement.

GP5. Tribunal's amended directions, dated 9 July 2014.

GP6. Deed for grant of mining tenement relating to the proposed licence, signed on behalf of the grantee party, the government party and the second native title party.

[16] The first native title party provided a statement of contentions on 1 September 2014 ('NTP Contentions').

[17] At the preliminary conference held on 21 May 2014, the second native title party indicated that, on the basis of its existing agreement with the grantee party, its involvement in the inquiry would be limited and it did not plan to make any submissions in the inquiry.

[18] The submissions made on behalf of the Government party and the grantee party were provided before the receipt of the first native title party's statement of contentions. For this reason, the Government party's statement of contentions note that, in the absence of specific evidence from the native title party, it is uncertain what effects, if any, there will be on the matters identified in s 39(1)(a) of the Act. The Government party states that they are most able to comment on the rights which will be conferred by the proposed licence; and, how these rights will be regulated, including how any effects will be regulated and minimised pursuant to the regulatory regime. Following receipt of the first native title party's documents, neither the grantee party nor the Government party sought to lodge contentions in reply.

[19] On 20 August 2014, the Tribunal wrote to all parties indicating I intended to determine the matter on the papers and dispense with hearings. No party objected to this course of action. I have considered all materials provided in this matter and I am

satisfied that it is appropriate to proceed on the papers in accordance with s 151(2) of the Act.

Evidence in relation to the proposed licence

Rights conferred by the proposed licence

[20] Under the *Mining Act*, the holder of a mining licence can exercise the rights set out in s 85, subject to the lessee covenants and various conditions set out in s 82. It is also possible for the Minister to impose further conditions under s 84 relating to the 'prevention or reduction of injury to land'. Endorsements can also be placed on the licence - these differ from conditions in that the licencee will not be liable to forfeit of the licence if endorsements are breached. In addition to those conditions set out in s 82 of the *Mining Act*, the Government party has indicated it intends to impose the conditions set out in the draft tenement endorsement and conditions extract, as follows:

ENDORSEMENTS

1. The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.

2. The Lessee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.

In respect to Water Resource Management Areas (WRMA) the following endorsements apply:

3. The Lessee [sic] attention is drawn to the provisions of the:
   - Waterways Conservation Act, 1976
   - Rights in Water and Irrigation Act, 1914
   - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
   - Country Areas Water Supply Act, 1947
   - Water Agencies (Powers) Act 1984
   - Water Resources Legislation Amendment Act 2007

4. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.

5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the Department of Water's relevant Water Quality Protection Notes and Guidelines for mining and mineral processing

In respect to Artesian (confined) Aquifers and Wells the following endorsements apply:

6. The abstraction of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless a current licence for the activities has been issued by the DoW.

In respect to Waterways the following endorsements apply:

7. Advice shall be sought from the DOW if proposing any mining/activity in respect to mining operations within a defined waterway and within a lateral distance of:
   - 50 metres from the outer-most water dependent vegetation of any perennial waterway, and
   - 30 metres from the outer-most water dependent vegetation of any seasonal waterway.

8. Measures such as effective drainage controls, sediment traps and stormwater retention facilities being implemented to minimise erosion and sedimentation of receiving catchments and adjacent areas.

CONDITIONS

1. Survey.

2. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.

3. All costeans and other disturbances to the surface of the land made as a result of exploration, including drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Industry and Resources (DoIR). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DoIR.

4. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program

5. Unless the written approval of the Environmental Officer, DoIR is first obtained, the use of scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.

6. The Licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs, water carting equipment or other mechanised equipment.

7. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
    - the grant of the Lease; or
    - registration of a transfer introducing a new Leasee;

   advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.

8. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Director, Environment, DoIR for his assessment and written approval prior to commencing any developmental or productive mining or construction activity.

9. Mining on any road, road verge or road reserve being confined to below a depth of 15 metres from the natural surface.

Historical mining activity and underlying tenure

[21] The proposed licence is entirely overlapped by one live prospecting licence, P21/617, which is held by the grantee party (and has been so since 1999), and by one live exploration licence held by another grantee party (since 2014). The proposed licence has also previously been subject to a number of other tenements, being:

- One exploration licence, 100% overlap, active between 1986 and 1991, now expired;
- 14 gold mining leases, between 5.3% and 100% overlap, active between 1905 and 1988, now forfeited or surrendered;
- One mining lease, 100% overlap, active between 1990 and 1999, now surrendered;

- Two mineral claims, 100% overlap, active between 1971 and 1983, now surrendered;
- Three prospecting licences, 100% overlap, active between 1987 and 1992, now expired.

[22] The proposed licence is entirely overlapped by Yarraquin Pastoral Lease (3114/553), and the DMP Tengraph Quick Appraisal shows there are 4 historic mine sites, a tailings storage area, and a track within the proposed licence.

Grantee party's proposed activity

[23] Based on the limited evidence before the Tribunal, it seems the grantee party has no intentions to commence productive mining in the immediate future. Prior to the lodgement of the s 35 application, the grantee party and first native title party had been negotiating the terms of a draft deferred production mining agreement (a copy of which was provided by the grantee party at GP4). Amongst other things, this agreement provided terms under which the grantee party could undertake exploration work over the proposed licence. Should the grantee party wish to move to productive mining, the agreement provided terms by which parties would negotiate and reach agreement on issues such as heritage protection, employment and training, and benefits and compensation before mining commenced. As noted earlier in this decision, documentation provided by the Government party indicates that the grantee party has held the underlying prospecting licence since 1999. The grantee party has provided no information in their contentions detailing their past or intended exploration or mining activities over the proposed licence.

[24] Given the relatively small size of the proposed licence (approximately 9.74 hectares) it would be reasonable to assume that mining of any considerable size or scale will not take place within this area alone. Whether or not this area of land will be used by the grantee party in conjunction with adjacent or nearby tenure or operations has not been discussed in submissions.

Aboriginal communities and Aboriginal cultural heritage

[25] There is no evidence of any Aboriginal communities within or in the vicinity of the proposed licence area.

[26] Searches of the Aboriginal Sites Database provided by the Government party indicates there are no registered sites or other heritage places within the proposed licence area.

[27] The grantee party states in its s 35 application that it has entered into an agreement with the second native title party in relation to the proposed licence, and that this will minimise the effect of the act on: the native title parties' enjoyment of their registered rights and interests; the way of life, culture and traditions of any of those parties; the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and, areas or sites, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions.

The regulatory context

[28] The proposed licence will be subject to the deemed conditions in s 82 of the *Mining Act*, as well as those enumerated in the list of proposed endorsements and conditions provided by the Government party (as outlined at [20]).

[29] The Government party notes that a range of State and Federal regulatory regimes will apply to activities undertaken by the grantee party on the proposed licence, including the *Aboriginal Heritage Act 1972* (WA) ('AHA') (GVP Contentions, paragraph 36). The Government party refers the findings made by the Tribunal in *Western Australia v Thomas* (at 209-211), which I adopt. Briefly, the AHA provides for the protection and preservation of Aboriginal sites and objects. It is an offence under s 17 of the AHA to excavate, destroy, damage, conceal or in any way alter any Aboriginal site. Section 18 of the AHA provides that the Minister may give consent to the use of land for a purpose likely to result in a breach of s 17. It is a defence to a breach of the AHA if the person charged can prove that he or she did not know, and could not reasonably be expected to have known, that the place was an Aboriginal site (s 62 AHA). It applies to all Aboriginal sites as defined in s 5, whether or not the site appears on the Register of Aboriginal sites.

[30] The proposed licence will also be subject to the *Environmental Protection Act 1986* (WA) ('EP Act'). The procedures under this legislation were outlined by the Tribunal

in *Minister for Mines v Evans* (at [53]-[58]) and I adopt the findings outlined in those passages. Briefly, a proposal must be referred to the Environmental Protection Authority for assessment where the proposal is likely, if implemented, to have a significant effect on the environment. The referral of *Mining Act* tenements is administered under a memorandum of understanding entered into between the Environmental Protection Authority and DMP.

[31] The EP Act was amended in 2003 to incorporate provisions requiring approval before clearing native vegetation (Part V, Division 2). According to the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA), mineral activities are exempt from this requirement if carried out pursuant to an authority granted under the *Mining Act* and not carried out in designated areas (reg 5, item 20 and schedule 1).

Native title rights and interests of the first native title party

[32] As it is the first native title party which is the focus of this inquiry, I outline the registered native title rights and interests for the Wutha determination application as follows:

a) rights and interests to possess, occupy, use and enjoy the area;
b) the right to make decisions about the use and enjoyment about the area;
c) the right of access to the area;
d) the right to control the access of others to the area;
e) the right to use and enjoy resources of the area;
f) the right to control the use and enjoyment of others of resources of the area;
g) the right to trade in resources of the area;
h) the right to receive a portion of any resources taken from the area;
i) the right to maintain and protect places of importance under traditional laws, customs and practices of the area; and
j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area

All claimed native title rights and interests are subject to:

i) To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.
ii) the claim does not include any offshore place.
iii) Subject to paragraph (iv) the applicants do not make a claim to native title rights and interests which confer possession, occupation use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in sec 23I in relation to the act;
iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such area as may be listed in Schedule L;
v) The said native title rights and interests are not claimed to the exclusion of any other rights and interests validly created by or pursuant to the common law, the law of the State or a law of the Commonwealth.

Legal principles

[33] The Tribunal must determine whether the act must not be done, or that the act may be done, or that the act may be done subject to conditions (see s 38 of the Act). Section 38(2) prohibits the Tribunal from imposing a profit-sharing condition with its decision. The Tribunal must assess the evidence provided by each party in terms of the criteria in s 39 of the Act, which reads as follows:

> **39 Criteria for making arbitral body determinations**
>
> (1) In making its determination, the arbitral body must take into account the following:
>
> (a) the effect of the act on:
>
> (i) the enjoyment by the native title parties of their registered native title rights and interests; and
>
> (ii) the way of life, culture and traditions of any of those parties; and
>
> (iii) the development of the social, cultural and economic structures of any of those parties; and
>
> (iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and
>
> (v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;
>
> (b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;
>
> (c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;
>
> (e) any public interest in the doing of the act;
>
> (f) any other matter that the arbitral body considers relevant.
>
> *Existing non-native title interests etc.*
>
> (2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:
>
> (a) existing non-native title rights and interests in relation to the land or waters concerned; and
>
> (b) existing use of the land or waters concerned by persons other than the native title parties.
>
> *Laws protecting sites of significance etc. not affected*
>
> (3) Taking into account the effect of the act on areas or sites mentioned in subparagraph (1)(a)(v) does not affect the operation of any law of the Commonwealth, a State or Territory for the preservation or protection of those areas or sites.
>
> *Agreements to be given effect*
>
> (4) Before making its determination, the arbitral body must ascertain whether there are any issues relevant to its determination on which the negotiation parties agree. If there are, and all of the negotiation parties consent, then, in making its determination, the arbitral body:
>
> (a) must take that agreement into account; and
>
> (b) need not take into account the matters mentioned in subsection (1), to the extent that the matters relate to those issues.

[34] The Tribunal must weigh the various s 39 criteria, and the Act does not require greater weight to be given to some criteria over others. It is a discretionary exercise in assessing the criteria, and the outcome of the assessment will depend on the evidence provided in relation to each criterion (see *Western Desert Lands v Holocene* at 37). In addition, for example, in *Western Australia v Thomas*, the Tribunal explained (at 165-166):

> We accept that our task involves weighing the various criteria by giving proper consideration to them on the basis of the evidence before us. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue mining and the interest of the Aboriginal people concerned.
>
> The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. There is no common thread running through them, and it is apparent that we are required to take into account quite diverse and what may sometimes be conflicting interests in coming to our determination. Our consideration is not limited only to the specified criteria. We are enabled by virtue of s 39(1)(f) to take into account any other matter we consider relevant.
>
> The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence.

[35] Section 36(1) of the Act requires the Tribunal to take all reasonable steps to make a determination as soon as practicable (subject to s 37 of the Act). Section 109(3) of the Act outlines the Tribunal is not bound by technicalities, legal forms or rules of evidence. Although there is no burden of proof incumbent on any of the parties during a future act determination inquiry, the Tribunal relies on the evidence provided in relation to the criteria (see *Western Australia v Thomas* at 157-158). Ultimately, a common sense approach to evidence is required and the determination will be based on logically probative evidence and application of the law (see *Western Australia v Thomas* at 162-163).

Summary of contentions and evidence

[36] Before addressing each of the s 39 criteria individually below, I should note that the contentions and evidence adduced by parties in this matter has been brief, limited and often lacking in specificity. For example, the grantee party has not provided contentions per se, but rather a number of documents that relate to this matter (at outlined at [15] above), however, the relevance and value of these documents to my considerations has been fairly limited.

[37] While the Government party provided more detailed contentions, they cited limitations in relation to what they could comment on given that, at the time of their compliance, no specific evidence had been provided by the native title party.

[38] The first native title party's contentions are general in nature and lack any specificity in relation to the area of the proposed licence. However, I am also cognisant of the fact that the first native title party are unrepresented in these proceedings. Therefore, this has had some bearing on the consideration I have given the native title party's position.

Consideration of the Section 39 Criteria

Sections 39(1)(a)(i) and 39(2) – enjoyment of registered native title rights and interests

Contentions and evidence

[39] The first native title party contends that the grant of the proposed licence will impair the recognition of its registered native title rights and interests, specifically the right to possess, occupy, use and enjoy the whole of the land subject to the proposed licence and the right to hunt and gather, camp, traverse and have access to natural resources in the area (NTP Contentions at 1(a)(i)). The first native title party submits that the proposed licence will interfere with its access to the proposed licence area and place impediments on: hunting and gathering; the extraction of flora and use of other resources in the proposed licence area; the conduct of religious, ceremonial and other activities; and the telling of stories and dreaming and the continuation of the oral traditions of the first native title party (NTP Contentions at 1(a)(v)(A)-(C)).

[40] The Government party contends that, in the absence of evidence regarding the extent to which the first native title party's registered native title rights and interests are enjoyed within the proposed licence area, the Tribunal should conclude that the proposed licence will not have any effect on the enjoyment of those rights and interests (GVP Contentions at 29). The Government party contends that any potential for interference will be mitigated by the imposition of conditions and endorsements by the Government party that address Aboriginal heritage and environmental protection (GVP Contentions at 35-35). The Government party also draws attention to the fact that the area is currently subject to an underlying pastoral lease which will already be creating some level of interference (GVP Contentions at 40). While it has

not been raised by the Government party, I have also given consideration to the fact that there have been a number of past exploration and mining tenements over the area of the proposed licence, since 1904.

[41] It is clear that the grant of the proposed licence is in direct conflict with the right to make decisions about the use and enjoyment of the area, as well as rights concerned with controlling access to the area and the use and enjoyment of the area's resources. However, there is no evidence as to how those rights are currently exercised or enjoyed in the proposed licence area, and it is likely that any rights of this kind have been affected by the underlying pastoral lease and earlier exploration and mining activity.

[42] While the first native title party have claimed that members carry on activities that are consistent with rights to use and enjoy the claim area and its resources, such as camping, hunting and gathering and making traditional weapons, there is no evidence regarding the extent to which these rights are actually enjoyed in the proposed licence area.

[43] I have also taken into consideration the fact that the proposed licence area represents approximately 0.09 per cent of the first native title party's claim area.

[44] The first native title party says there is further evidence about the activities carried on by the first native title party in its native title application and the materials provided in support of the claim's registration (NTP Contentions, paragraph 1(a)(v)(B)). The Tribunal was not directed to any specific material and it is not clear to what extent these materials might concern the exercise or enjoyment of the registered native title rights and interests in the proposed licence area. The first native title party asserts that much of this information is subject to confidentiality orders, and other confidentialities according to traditional laws and custom. The nature and scope of those orders and the documents to which they apply were not explained. If any of the information is confidential on a cultural basis, the first native title party could have asked the Tribunal to make non-disclosure directions under s 155 of the Act. The first native title party also says that a lack of resources and consents has prevented them from obtaining much of this information. However, that does not provide the Tribunal with any basis for assuming there will be any effect on the registered native title rights

and interests (see *Coalpac v Gundungurra Tribal Council* at [49]-[52]; *Cameron v Hoolihan* at [15]-[17]; *The Griffin Coal Mining Co v Nyungar People* at [7]-[10]).

[45] In conclusion, I find that based on the evidence provided in this matter, the grant of the proposed licence will have a minimal effect on the native title parties' enjoyment of their registered native title rights and interests.

Section 39(1)(a)(ii) – way of life, culture and traditions of the native title party

Section 39(1)(a)(iii) – development of social, cultural and economic structures of the native title party

[46] The first native title party contends that its physical connection with the area will be severed by lack of access to the land if the proposed licence is granted, and its spiritual connection will be affected due to its inability to exercise its native title rights and interests. The first native title party also contends that its members will be prevented from engaging in and protecting their traditional cultural pursuits and way of life generally, and will be unable to perform their traditional practices and responsibilities due to restrictions on access (NTP Contentions at 1(a)(ii)).

[47] The first native title party contends that any ground disturbance that interferes with the dreaming stories of the cultural landscape may interfere with the capacity of present and future generations of Wutha people to interpret their stories. It is submitted that this will deprive the Wutha people of the ability 'to freely determine the social and cultural arrangements from which they draw their identity and thus construct meaning in their lives' (NTP Contentions at 1(a)(v)(D)). The first native title party further submits that an independent social impact assessment should be made before any activity is undertaken on the proposed licence, to determine the nature and scale of the proposed activity and its effect on the social, cultural and economic structures of the Wutha people (NTP Contentions at 1(a)(iii)).

[48] The Government party submits that, in the absence of particulars and supporting evidence, the Tribunal should conclude that there will be little or no effect on the way of life, culture and traditions of the first native title party (GVP Contentions at 41, 44).

[49] I address the effect of the proposed licence on areas or sites of particular significance to the first native title party later in these reasons, and I discuss the proposal for a

social impact assessment when I come to consider the question of whether the proposed licence should be made subject to conditions. In considering the ambit of s 39(1)(a)(iii), I accept the Government party's contention. There is no material before me to make a conclusion that the grant of the proposed licence will have any effect on the native title party's way of life, culture or traditions, or development of their social, cultural or economic structures.

Section 39(1)(a)(iv) – freedom of access and freedom to carry out rites and ceremonies

[50] The first native title party contends that the Wutha people have traditionally enjoyed freedom of access to the subject land and desire access to the country at all times (NTP Contentions at 1(a)(iv)). The first native title party submits that the grant of the proposed licence will curtail its freedom of access to the land and place an impediment on the conduct of religious, ceremonial and other activities (NTP Contentions at 1(a)(ii), 1(a)(v)(B)).

[51] The Government party contends there is no evidence that any rites, ceremonies or other activities are conducted on the proposed licence area (GVP Contentions, paragraph 45).

[52] Again, I accept the Government party's contention that there is no evidence of any rites, ceremonies or other activities of cultural significance being carried out in the proposed licence area. Accordingly, it is not possible to make any finding regarding the effect on the native title parties' freedom to carry out rites, ceremonies or other activities of cultural significance in the proposed licence area.

Section 39(1)(a)(v) – effect on areas or sites of particular significance

[53] The first native title party contends that the proposed licence is likely to interfere with areas and sites of particular significance in accordance with the traditions of the Wutha native title claim group (NTP Contentions at 1(b)(ii)). In support of this contention, the first native title party submits that:

- it is possible that not all areas and sites of particular significance to the Wutha people have been identified or recorded;

- none of the Wutha people have been invited nor participated in any survey undertaken over the proposed licence area;

- until such time as an approved Wutha Heritage Protection Survey has been undertaken, it is impossible to say with certainty that the grant of the proposed licence is not likely to interfere with area or sites of significance;

- sites may exist but have not been entered onto the Register of Aboriginal sites; and

- the AHA does not afford adequate protection and no conditions have been placed on the proposed licence requiring the permission of or consultation with the Wutha people prior to any exercise of the ministerial discretion to disturb Aboriginal sites, or any other conditions regarding heritage or consultation.

[54] As noted above at [26], the searches of the Aboriginal Heritage Database provided by the Government party indicate there are no registered sites or 'other heritage places' within the proposed licence area.

[55] The Government party contends the first native title party must identify and establish there are areas or sites of particular significance to them in accordance with their traditions. It notes that three heritage surveys have taken place over land which includes the proposed licence area – two archaeological and one ethnographic (GVP Contentions at 49-50). The survey reports note a number of sites, however, it is unclear if these are located within the proposed licence. Further, the first native title party have made no reference to these sites or any sites specifically in their contentions.

[56] In the present matter, there is no evidence of any sites or areas of particular significance within the proposed licence. Nevertheless, the first native title party contends that it is possible sites or areas may exist in the area, though they have not been identified or recorded. In this respect, the first native title emphasised the fact that none of the Wutha people have participated in a survey over the proposed licence area or have been invited to do so. Member McNamara recently dealt with this same

contention by the first native title party in *Peregrine Resources v Wutha* and I adopt his findings at [88]-[89] for the purposes of this determination.

[57] In the absence of any evidence from the first native title party regarding areas or sites of particular significance to them, I cannot find the grant of the proposed licence will have any effect on this criterion.

Section 39(1)(b) – interests, proposals, opinions or wishes of the native title party

[58] The first native title party states that it has previously made attempts to settle the matter 'on the basis of heritage and Aboriginal protection and consultation' but has not been able to obtain adequate or specific information from the grantee party regarding their proposed activities over the proposed licence (NTP Contentions at 12-13).

[59] The first native title party contends that, at a minimum, the proposed licence should be the subject of conditions requiring a work programme order and a heritage clearance survey to be conducted with the Wutha people. According to the first native title party, this would ensure that 'the stories connected with the cultural landscape, sites of significance and other registered native title rights and interests are recorded and not unnecessarily disturbed and indeed made known to the grantee party so as no disturbance will take place' (NTP Contentions, paragraph 11). As noted above at [47], the first native title party also contends that the proposed licence should be subject to an independent social impact assessment.

[60] In its contentions, the Government party states that the first native title party has not provided evidence regarding its interests, proposals, opinions or wishes concerning the management, use and control of the land and waters concerned. It contends that, based on the Government's regulatory regime, it is likely the first native title party will continue to be able to use the proposed licence area (GVP Contentions at 54-55).

[61] While the Tribunal is obliged to have regard to the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the land or waters concerned, the fact that a native title party has not been able to negotiate an agreement that is satisfactory to it is not on its own sufficient justification for a determination that the act cannot be done (see *Adani Mining v Diver* at [98]).

The material before me suggests that the first native title party is not opposed to mining activity, as long as it is done on the basis of an agreed heritage process and perhaps following a social impact assessment, although it is not clear whether this was raised in negotiations with the grantee party.

[62] In assessing the relative weight to be given to this criterion, I have also taken account of the second native title party's consent to the proposed licence.

Section 39(1)(c) – economic or other significance

[63] The Government party contends that the grant of the proposed licence is of potential economic significance to the nation, the State and the local region. The benefits of the State include potential royalties, and benefits to Australia include export income. The Government party also submits there is likely to be a benefit to the local economy in and around the general area (GVP Contentions at 56).

[64] The Tribunal has consistently accepted the economic benefits arising from the grant of mining tenure in Western Australia and therefore, in the absence of any evidence to the contrary, I accept that the proposed licence is likely to generate some economic benefits, although I cannot draw any conclusions as to the extent of such benefits.

[65] There is no evidence that the expenditure will directly benefit local Aboriginal people, though it may do so if any Aboriginal people are employed or contracted by the grantee party during mining. There may also be benefits to local Aboriginal people that will accrue from the grantee party's agreement with the second native title party, but as the document has not been provided in this inquiry I make no finding in this respect.

Section 39(1)(e) – the public interest

[66] The Government party contend that the public interest is served by the development of mines on the proposed licence which will lead to economic benefits accruing at a local, state and national level (GVP contentions at 57).

[67] I accept that any economic benefits arising from the mining will be likely to serve the public interest, though I have already noted that it is unlikely these will be significant from the proposed licence alone, given its size.

Section 39(1)(f) – any other relevant matters

[68] The Government party contends that the effect of the proposed licence on the natural environment may be a relevant factor, citing *WMC Resources v Evans* (at [81]) (GVP Contentions at 58). The Government party submits that any effects on the local environment will be regulated and minimised by:

- the limitations imposed by the *Mining Act* and *Mining Regulations*, including the conditions deemed to apply by s 82 of the *Mining Act*;
- the proposed conditions and endorsements; and
- the State and Federal regulatory regime with respect to environmental protection and the protection of Aboriginal heritage.

[69] The Tribunal may have regard to the environmental impact of the future act (see *WMC Resources v Evans* at [81]). The Tribunal may also have regard to the environmental protection regime as described in *Western Australia v Thomas* and *Minister for Mines v Evans* and noted above at [30]-[31].

[70] It is possible the grantee party will undertake a range of activities over the proposed licence, including those of a ground-disturbing nature. However, these activities will be regulated by the conditions of grant and the environmental protection regime. Specifically, the *Mining Act* requires a programme of work to be lodged and approved before ground-disturbing equipment may be used. In accordance with its memorandum of understanding with the Environmental Protection Authority, DMP will refer the programme of work for assessment under the EP Act if it is likely to have a significant effect on the environment. The grantee party will also be required to comply with the rehabilitation measures outlined in the proposed conditions.

[71] In the absence of evidence regarding any specific environmental considerations that might be associated with the grant of the proposed licence, I am satisfied that the regulatory regime is likely to ensure the proposed licence has minimal impact on the environment.

Conditions

[72] The Tribunal has a broad discretion to impose conditions, though it must be exercised by reference to the s 39 criteria and it is controlled by the subject matter, scope and purpose of the Act (see *Re Koara People* at 93). Conditions will not normally be imposed unless the evidence suggests a need for them (see *Magnesium Resources v Puuntu Kunti Kurruma and Pinikura* at [92]-[96]).

[73] The first native title party makes several submissions throughout its statement of contentions regarding conditions it believes ought to be imposed. First, it is submitted that an independent social impact assessment is necessary prior to any operations on the proposed licence area. Second, it submits that the proposed licence should be subject to a condition requiring 'a work programme order and site heritage clearance survey' to be conducted with the first native title party. Third, the first native title party makes reference to a condition requiring permission from or consultation with the Wutha People before the exercise of any ministerial discretion to permit disturbance with sites of significance. Lastly, the first native title party notes that the Government party has not sought to impose any conditions in relation to heritage or consultation generally. I will deal with each of these proposed conditions separately below.

Social Impact Assessment

[74] The first native title party submits that an independent social impact assessment 'needs to be undertaken to determine the nature and scale of the proposed prospecting, exploration and mining and its effect on the social, cultural and economic structures of the Wutha People' (NTP Contentions, paragraph 1(a)(iii)). However, no evidence has been provided in support of this proposal.

[75] Given there has been no evidence to support a finding in the native title party's favour in regards to s 39(1)(a)(iii), it follows that there is insufficient evidence to impose a condition requiring an assessment of the proposed licence on these factors.

Heritage Survey / Heritage Consultation

[76] It is submitted by the first native title party that a work programme order and heritage survey should be undertaken with the Wutha People 'in order that *inter alia* the stories

connected with the cultural landscape, sites of significance and other registered native title rights and interests are recorded and not unnecessarily disturbed and indeed made known to the Grantee Party so as no disturbance will take place' (NTP Contentions at 11). It is not clear, however, what constitutes a 'work programme order.'

[77] There is no evidence that sites or areas of particular significance in accordance with the traditions of the native title parties will be affected by the grant of the proposed licence area. I accept there is a possibility that sites or areas of this kind exist within the proposed licence that have yet to be identified, but given the lack of evidence I have not given particular weight to this possibility.

[78] The agreement entered into between the grantee party and the second native title party requires a heritage survey to be undertaken in specified circumstances. Though this agreement is likely to identify any sites or areas that are significant to the second native title party, it may not identify sites or areas that are significant to the first native title party. However, I am satisfied that the grantee party is aware of its obligations under the AHA and will take appropriate steps to comply with then.

[79] In the circumstances, I have not found that a condition requiring a heritage survey to be undertaken with the first native title party should be imposed.

Permission or consultation prior to exercise on ministerial discretion

[80] The first native title party contends that, despite the grantee party's contention that it will comply with the AHA, the existence of a ministerial discretion under s 18 of the AHA to permit disturbance with sites means there is likely to be interference with areas or sites of particular significance unless a condition is imposed requiring the permission of or consultation with the Wutha People prior to the exercise of the discretion. It is not clear whether it is contemplated that the proposed condition is to be complied with by the grantee party or the Government party or both.

[81] A condition requiring the grantee party to obtain the first native title party's permission before it seeks the Minister's consent under s 18 would not be consistent with the subject matter, scope and purpose of the Act, as it would amount to a veto on exploration activity (see *Re Koara People* (at 80) and *Minister for Lands v Strickland*). A condition binding the Government party would have the same effect

and would also amount to a fetter on the Minister's discretion (see *Minister for Lands v Strickland* and *Western Australia v Thomas* (at [262]-[263])).

[82] The administrative procedures for obtaining consent under s 18 already contemplate consultation. These procedures are described in *Parker v Ammon* (at [35]-[41]). Briefly, a person seeking to obtain consent must give notice to the Aboriginal Cultural Materials Committee ('ACMC'). The ACMC is then required to form an opinion on whether there is any Aboriginal site on the land, evaluate the importance and significance of the site and then make a recommendation to the Minister as to whether consent should be given and if so on what conditions. The Minister is not required to follow the recommendation, but is required to consider it 'having regard to the general interest of the community' (s 18(3) AHA). The notice to the ACMA must provide a summary of consultations with relevant Aboriginal people and other stakeholders. This would presumably include both native title parties. The summary must provide an outline of: the process used to consult; the basis for selecting those consulted and reasons why others were not consulted; comments made by Aboriginal people about the proposal; the outcomes of the consultation process; and the nature and outcomes of any heritage survey report.

[83] The Tribunal has previously imposed conditions requiring notice to be given to the native title party in relation to s 18 applications. In *Minister for Mines v Evans*, conditions were imposed requiring the grantee party to serve a copy of the notice given to the ACMC on the native title party and required the grantee party to provide the native title party with an opportunity to meet and discuss the application. However, whether such conditions are warranted will depend on the evidence presented. In *Western Australia v Thomas*, a finding that the evidence merely established the possibility of sites that could be affected by the acts was not considered to provide sufficient basis for imposing a condition requiring notice to be given in the event of a mining proposal. I consider this to be equally applicable to a condition requiring notice or consultation in the event of a s 18 application.

[84] In the circumstances, I am satisfied there is no evidence to support the imposition of a condition requiring consultation prior to any application under s 18 of the AHA, or any other condition relating to heritage or consultation.

Conclusion

[85] After taking into account the effect of the proposed act on the matters set out in s 39(1), as outlined in the analysis in this decision, I conclude that the act may be done and that it is not an appropriate case to impose conditions. I have given weight to the various factors on the basis of the evidence before me, and note that the first native title party provided contentions only, and no evidence in the form of other documents, affidavits or statements in support of their contentions.

Determination

[86] The determination of the Tribunal is that the act, being the grant of mining licence M21/158 to John Edward Telfer, may be done.

Helen Shurven
Member
3 October 2014