

NATIONAL NATIVE TITLE TRIBUNAL

John Walter Graham & Ors on behalf of Ngadju/Western Australia/Mulciber Metals Pty Ltd, [2011] NNTTA 167 (18 August 2011)

Application No: WO10/1371

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

- and -

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

John Walter Graham & Ors on behalf of Ngadju (WC99/2) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Mulciber Metals Pty Ltd (grantee party)

DETERMINATION THAT THE ACT IS NOT AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member

Place: Perth

Date: 18 August 2011

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act is likely to interfere directly with the carrying on of community or social activities – whether act is likely to interfere with sites of particular significance – whether act is likely to cause major disturbance to land or waters – expedited procedure not attracted.

Legislation: *Native Title Act 1993* (Cth), ss 29, 31, 146, 151(2), 237
Mining Act 1978 (WA) ss 24, 29, 63
Aboriginal Heritage Act 1972 (WA) ss 5, 17, 18
Aboriginal Affairs Planning Authority Act 1972 (WA) s 31
Aboriginal Affairs Planning Authority Act Regulations 1972 (WA)

Cases: *Bruce Monadee and Others on behalf of the Ngaluma Injibandi/Western Australia/Auriferous Mining Pty Ltd, Red Bluff Nominees Pty Ltd* [2002] NNTTA 115

Butcher Cherel and Ors on behalf of the Gooniyandi Native Title Claimants/Western Australia/Faustus Nominees Pty Ltd [2007] NNTTA 15

Champion v Western Australia and Another (2005) 190 FLR 362
[2005] NNTTA 1

Evelyn Gilla and Others on behalf of Yugunga-Nya/Western Australia/Blackjack Resources Pty Ltd [2002] NNTTA 35

John Graham & Ors on behalf of Ngadju/Western Australia/Mulciber Metals Pty Ltd [2011] NNTTA 165

Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd [2011] NNTTA 22

Little and Others v Oriole Resources Pty Ltd (2005) 146 FCR 576;
(2005) 225 ALR 202; [2005] FCAFC 243; [2006] ALMD 2977

Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon [2006] NNTTA 65

Parker on behalf of the Martu Idja Banyjima People v State of Western Australia [2007] FCA 1027

Parker v Western Australia and Others (2008) 167 FCR 340;
(2008) 245 ALR 436; (2008) 101 ALD 28; [2008] FCAFC 23;
[2008] ALMD 5175

Silver and Others v Northern Territory of Australia and Others
(2002) 169 FLR 1; [2002] NNTTA 18

Smith v Western Australia and Another (2001) 108 FCR 442;
[2001] FCA 19

Walley and Others v Western Australia and Another (2002) 169
FLR 437; [2002] NNTTA 24

Representatives of the native title party: Mr Dante Mavec, Goldfields Land and Sea Council

Representatives of the Government party: Mr Domhnall McCloskey, State Solicitor's Office
Mr Dennis Jacobs, Department of Mines and Petroleum

Representative of the grantee party: Mr Dennis Hawtin

REASONS FOR DETERMINATION

[1] On 16 June 2010, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E63/1380 ('the proposed licence') to Mulciber Metals Pty Ltd ('the grantee party') and included in the notice a statement that it considered that the grant attracted the expedited procedure.

[2] The proposed licence comprises an area of 579.05 square kilometres located 100 kilometres east of Norseman in the Shire of Dundas. It is 100 per cent within the registered native title claim of the Ngadju people (WC99/2 – registered from 28 September 2000), who are the native title party in these proceedings. On 13 October 2010, the native title party lodged an expedited procedure objection application with the Tribunal.

[3] The registered claim of the Narnoobinya Family Group (WC97/40 – registered from 4 June 1997) also overlaps the proposed licence (by 99.19 per cent), but these claimants have not lodged an objection in relation to the proposed licence. On 9 April 2010, the grantee party declared they had offered to enter into a Regional Standard Heritage Agreement (RSHA) with the Narnoobinya.

[4] In accordance with standard practice, the Tribunal gave directions to parties to provide contentions and documents for an inquiry to determine whether or not the expedited procedure is attracted. These directions allow a period after the s 29 closing date for the lodgement of objections, for parties to discuss the possibility of reaching an agreement which could lead to disposal of the objection by consent. Directions made by the Hon C J Sumner on 9 November 2010 included that the Tribunal be provided with contentions and documents of the: Government party by 7 February 2011; native title party by 14 February 2011; and grantee party by 21 February 2011.

[5] The Department of Mines and Petroleum ('DMP') provided documents on 24 January 2011 and the Government party lodged its contentions and evidence on 3 February 2011. On 14 February 2011, the native title party lodged its contentions and evidence, including sworn affidavits of Mr John Graham, Mr James Schultz, and Mr John Walter Graham (also known as Mr Danny Graham). The grantee party did not provide formal contentions in this matter and instead, at the listing hearing on 3 March 2011, advised it would rely on the evidence and contentions of the State.

[6] At the listing hearing on 3 March 2011, all parties agreed that this matter could be determined ‘on the papers’ (that is, without holding a hearing). I am satisfied that the objection can be adequately determined in this way (as per s 151(2) of the Act). On 24 June 2011, I was appointed by Hon C J Sumner as the Member for the purposes of conducting the inquiry.

Legal principles

[7] Section 237 of the Act provides:

Act attracting the expedited procedure

A future act is an *act attracting the expedited procedure* if:

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

[8] In *Walley and Others v Western Australia and Another* (2002) 169 FLR 437; [2002] NNTTA 24, Hon C J Sumner considered the applicable legal principles (at 439-449 [7]–[23]) and I adopt those findings for the purposes of this inquiry (s 146 of the Act).

[9] In relation to the nature of an exploration licence including conditions to be imposed, I adopt the Tribunal’s findings in *Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd* [2011] NNTTA 22 (‘*Tarlpa*’) at [10]–[16].

[10] In relation to determining s 237(a), I adopt the following findings from *Tarlpa*:

- History and interpretation of s 237(a) as amended (paras [57]–[64]).
- The Tribunal’s approach to the interpretation of s 237(a) as amended (para [75]). The Hon C J Sumner has made it clear (para [66]) that ‘the law as applied by the Tribunal since the 1998 amendments does now require there to be evidence of direct interference with the community or social activities of the native title party which are of a physical and not purely spiritual nature for the expedited procedure not to be attracted’.

- The definitions of ‘interfere directly’ and ‘carrying on’ as applied to s 237(a) (paras [105]-[109]).
- Must the community or social activities take place on the proposed licence area? (paras [85]-[86]).

[11] With respect to issues arising under s 237(b), I adopt the findings of the Tribunal in *Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon* [2006] NNTTA 65 (*‘Maitland Parker’*) at [31]–[38], [40]–[41]. In *Parker on behalf of the Martu Idja Banyjima People v State of Western Australia* [2007] FCA 1027, the Federal Court (Siopis J) dismissed an appeal by the native title party from the Tribunal’s decision in *Maitland Parker*. This decision was then appealed to the Full Federal Court and in separate judgments was dismissed on 7 March 2008 (*Parker v Western Australia and Others* (2008) 167 FCR 340; (2008) 245 ALR 436; (2008) 101 ALD 28; [2008] FCAFC 23; [2008] ALMD 5175).

[12] The task of the Tribunal in relation to s 237(c) is to undertake a predictive assessment as to the likelihood of major disturbance to land and waters or create rights which might entitle the grantee party to do so (see *Little and Others v Oriole Resources Pty Ltd* (2005) 146 FCR 576; (2005) 225 ALR 202; [2005] FCAFC 243; [2006] ALMD 2977 (*‘Little’*)). The correct approach to be taken to this limb of s 237 is outlined by the Full Court in *Little* at 588-589, where it held that the Tribunal was wrong to approach s 237(c) on the basis that major disturbance should be determined by what could be done rather than what was likely to be done.

Evidence in relation to the proposed act

[13] Government party documents include:

- A statement of contentions;
- A Tengraph plan with topographical detail, tenement boundaries and historical land tenure;
- A report and plan from the Department of Indigenous Affairs (*‘DIA’*) Sites Register;
- A copy of the tenement application;
- An instrument of licence and the first schedule listing land included and excluded from the grant;

- A statutory declaration from the grantee party relating to the offer to enter into a RSHA with the Narnobinya people;
- The proposed endorsements and conditions of grant; and
- A Tengraph Quick Appraisal.

[14] Government party documentation establishes the following notable underlying land tenure on the proposed licence:

- Pastoral Lease 3114/1137 (FRASER RANGE) at 30.3 per cent;
- Pastoral Lease 398/815 (SOUTHERN HILLS) at 66.8 per cent;
- A Reserve for the Use and Benefit of Aboriginal People (CR50004) at 0.2 per cent;
- A Conservation of Flora and Fauna Area (CR36957) at 3.1 per cent; and
- A number of Road Reserves, a Stock Route and Private Land, all at 0.1 per cent or less.

DMP evidence indicates that services affected on the proposed licence include several Major Roads, many Tracks, a Ruin and Building (both symbolized), a Fence Line, three Feature Identification Dots, three Well/Bore with Windmills, a number of Earth Dams (symbolized), two Minor Watercourses (non-perennial), a Channel/Drain, a Spring/Soak/Rockhole/Waterhole and a Mine (open pit-care and maintenance). There are also two pending prospecting licences overlapping the proposed licence (at 0.2 and 0.3 per cent respectively), as well as two live mining tenements (both overlapping at 0.3 per cent each), four live exploration tenements, with the largest (E63/1319) overlapping by 14.1 per cent, and the others overlapping by 0.1 per cent each, and two pending exploration licences, with one overlapping by one per cent and the other (E63/1463) overlapping by 82.3 per cent.

[15] DIA documents provided by the Government party show that there are 10 Registered Aboriginal Sites within the proposed licence, being five Registered Aboriginal Sites and five Other Heritage Places:

Registered Aboriginal Site

- Southern Hills 01 (Site ID 1139), Artefacts/Scatter;
- Southern Hills 02 (Site ID 1095), Artefacts/Scatter;

- Southern Hills 03 (Site ID 1096), Artefacts/Scatter;
- Fraser Range Granite ‘150’ (Site ID 1286), Man-Made Structure, Artefacts/Scatter; and
- Southern Hills Burials (Site ID 17232), Skeletal material/Burial.

Other Heritage Place

- Ten Mile Rocks (Site ID 1340), Artefacts/Scatter;
- Mt Malcolm (Site ID 1341);
- Mt Malcolm North (Site ID 1342), Artefacts/Scatter;
- Fraser Range (Site ID 2876), Artefacts/Scatter; and
- Janyorna/Danjuna, Gnama Hill (Site ID 17230), Artefacts/Scatter, Camp, Hunting Place, Water Source.

Two of these sites (1340 and 1341) are closed sites.

[16] A map prepared by the Tribunal’s geospatial services on 16 March 2011 shows that there are no Aboriginal communities within the proposed licence area.

[17] The list of dead tenements indicates that there is evidence of:

- Some previous applications for coal mining leases (all at 0.2 per cent or less), which were surrendered between 1982 and 1983;
- Six mining leases, all withdrawn before grant;
- One mineral claim, cancelled in 1978 at 0.2 per cent; and
- Five prospecting licences, all of which were granted in 1992 and forfeited in 1996, and all at 0.4 per cent or less.

In total, 89 applications for licences had been made over this area, with 34 not granted (all withdrawn apart from one which was refused) and 55 granted. Of those granted, one has expired, 45 were surrendered, eight were forfeited and one cancelled. The grant and death dates were variously between 1977 and 2010. The tenements granted were for purposes such as exploration, mining (including coal mining) and prospecting.

[18] The grant of the proposed licence for E63/1380 will be subject to the standard conditions imposed on the grant of all exploration licences in Western Australia (see *Maitland Parker* at [21] - Conditions 1-4). An additional six conditions are as follows:

- ‘5. 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.
 6. The licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
 - the grant of the licence; or
 - registration of a transfer introducing a new licensee;
 advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.
 7. No excavation, excepting shafts, approaching closer to the Eyre Highway, Highway verge or the road reserve than a distance equal to twice the depth of the excavation and mining on the Eyre Highway or Highway verge being confined to below a depth of 30 metres from the natural surface, and on any other road or road verge, to below a depth of 15 metres from the natural surface.
 8. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Conservation of Flora and Fauna Reserve 36957 and Use and Benefit of Aboriginal People and Cultural Heritage Protection Reserve 50004.
 9. No interference with Geodetic Survey Station Balladonia 1, NOR 153 and NOR 154 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.
- Consent to mine on Stock Route Reserve 17401 granted subject to;**
10. No exploration activities being carried out on Stock Route Reserve 17401 which restrict the use of the reserve.’

According to documents provided by the Government party, these conditions will regulate the exploration activities on the current proposed licence site.

[19] According to Government party documents, the following three endorsements (which differ from conditions in not making the licensee liable to forfeiture of the proposed licence for their breach) will be imposed:

- ‘1. The licensee’s attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
2. The licensee’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.
3. The grant of this licence does not include the land the subject of prior Exploration Licence 63/707. If the prior licence expires, is surrendered or forfeited that land may be included in this licence, subject to the provisions of the Third Schedule of the Mining

Regulations 1981 titled "Transitional provisions relating to Geocentric Datum of Australia".'

[20] Government party contentions (at 5(h)) also state that a condition will be imposed in the following terms:

'In respect of the area covered by the licence the Licensee, if so requested in writing by Ngadju, the applicants in Federal Court application no. WAD6020 of 1998 (WC99/2), such request being sent by pre-paid post to reach the Licensee's address, c/- Giralia Resources NL, PO Box 1665 WA 6872 not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of Narnoobinya the Regional Standard Heritage Agreement endorsed by peak industry groups and the Goldfields Land and Sea Service.'

I note the State refers to Giralia Resources NL and not to the named grantee party as the licensee. Advice from DMP indicates that the licensee's address has in fact changed since these contentions were drafted, and the correct address would replace that listed above should the matter proceed to grant.

Native title party evidence

[21] The material provided by the native title party includes: contentions; a map compiled on 7 February 2011 by Goldfields Land and Sea Council (GLSC); affidavits of Mr John Graham and Mr John Walter Graham sworn on 10 February 2011; and an affidavit of Mr James Schultz, sworn on 11 February 2011.

[22] The affidavit of Mr John Graham is made in the following terms:

'I, John Graham, of 13 Mines Road, Norseman, in the State of Western Australia, being duly sworn, make oath and say as follows:

1. My name is John Graham. I am 69 years old.
2. I am a member of the Ngadju native title claim group. I am an elder of the Ngadju people.
3. I am Ngadju because my ancestors were Ngadju.
4. My mother, Violet Graham, was Ngadju, through her father Jacob Dimer. His mother, *Belang*, is an apical ancestor on the Ngadju claim.
5. My father, Robin Graham, was Ngadju, through his mother Molly. Her parents, Maggie and Jumbo, are apical ancestors on the Ngadju claim.
6. I have authority to speak for the sites I talk about below because I am a senior Ngadju and because my Ngadju elders handed down traditional knowledge of these sites to me.
7. As a young man I lived, worked and hunted all over the Southern Hills/Fraser Range area between 1959 and 1960. This is when the old people taught me about the special places in this area. I know the area very well, and I have been out there many times over the years.

Areas of sites of particular significance

8. I have seen a map of the proposed tenement E63/1380. I know that area very well and I know of a number of important sites to the Ngadju people within the area of the

tenement. Mulciber Metals need to talk to us Ngadju before doing any exploring on this tenement, otherwise they might damage our sites. We need to have a heritage survey so we can tell them whether it's alright for them to carry out their exploration plan or whether they need to make some changes to their plan so they don't disturb any of our sites.

9. Just inside the Southern Hills boundary fence, in the westernmost part of the tenement, **an old Ngadju woman is buried.**
10. I was shown this woman's burial place and told her name by a Ngadju elder in 1979. I cannot remember the woman's name now.
11. The area has since been bulldozered [sic] so it is not obvious where her bones are, but I would be able to find the spot again.
12. Nobody should dig her up. Just because she isn't buried in a cemetery doesn't mean that it's alright to disturb or drill through her bones. She needs to be left to rest in peace.
13. A **child is buried** near the Southern Hills shearing shed, right in the middle of the tenement.
14. The child was the brother of old Grannie Mabel. He died as a baby and never had a name.
15. It would be hard to find the exact place that he was buried because the ground has been cleared.
16. His bones should not be disturbed, the same as that old woman.
17. There is a **rockhole at a granite hill** near the Southern Hills homestead. There is a rockhole on the side of the hill, and then on top there are some corroboree grounds.
18. A big mob of Ngadju families used to camp at the rockhole. They used it for their water. Ngadju people were born there and died there.
19. Ngadju people used to dance on the top of the hill up until sometime in the 1930s. The men would do ceremonies up there as well, and when the men did this the women had to cover their heads with a blanket so they wouldn't see. I was told this by my old people.
20. Nobody should disturb the rockhole, the campground or the hill. Under our laws and customs they have to be respected. Activities like drilling or digging would disturb them. This would disturb the spirits there, and make them angry. They might the miners [sic] get sick.
21. There is a **sacred rock** located near the road going north from the old Southern Hills homestead to Bullock Hill. It's inside the tenement but I don't want to say exactly where it is. It's hidden in the scrub.
22. It is a very special rock, and is a sacred men's site. Ngadju men used to do ceremonies there.
23. I don't want to say any more about that place, except that it is very important that nobody disturbs it by clearing or digging or drilling nearby.
24. The site called "**Mt Malcolm**" on the DIA Sites Register is a very special Ngadju site. There is a rockhole there, where Ngadju people used to camp and get water from the rockhole. We Ngadju people still have responsibility to look after it.
25. Water was very precious to the Ngadju people back then and to this day we have to protect our rockholes.
26. Nobody should disturb the rockhole by drilling or digging anywhere near it. If that happened it would upset the spirits at the rockhole and bad things could happen, like people getting sick.'

[23] The affidavit of Mr John Walter Graham (also known as Mr Danny Graham) is made in the following terms:

I, John Walter Graham, of 188 Fisheries Road, Condingup, in the State of Western Australia, being duly sworn, make oath and say as follows:

1. My name is John Walter Graham, but I am known as Danny Graham. I am 61 years old.
2. I am a *Marlpa* person and a member of the Ngadju native title claim group. *Marlpa* and Ngadju are two different names for the same people.
3. I am also an applicant for the Ngadju claim.
4. I am *Marlpa* because my ancestors are *Marlpa*. My father, Didla Graham, was *Marlpa*. So were both of his parents, Maggie and Jumbo. They are apical ancestors for the Ngadju claim.
5. I am one of the oldest living *Marlpa* people, and I have had knowledge handed down to me from my ancestors and other old *Marlpa* people who were my elders, which gives me authority to speak for our important sites.
6. I know the land around Fraser Range and Southern Hills very well. While I was working at Fraser Range for about ten years from the late 1960s I would often go to work on Southern Hills when they needed people to help with the mustering. I would sometimes fill in for the manager of Southern Hills station during this time. I have been all over this station with my *Marlpa* elders.

Areas or sites of particular significance

7. I have seen a map of the proposed tenement E63/1380. I know that area very well and I know of a lot of important sites to the *Marlpa* people that are in the tenement.
8. There is a **grave southwest of Rule's Dam**. On the map I was shown, Rule's Dam is named "Rurell Well". I don't think anybody else knows about this grave because I've never heard anyone else talk about it.
9. There is another **grave southwest of Peters Hole**. My Aunty Eileen told me that there is a *Marlpa* buried in that grave. There is a small mound in the ground with rocks around it to mark the grave.
10. Everyone needs to keep away from these graves and not interfere with them in any way. Those people's bones need to be left alone. Their spirits will get angry if they are disturbed and something might happen to whoever's responsible.
11. There is a rockhole at **Gnama Hill** where all the old *Marlpa* people used to live. They camped there and would catch bobtail goannas and kangaroos there. *Marlpa* people would meet on top of the hill.
12. This area is very special to the *Marlpa* people because it is where the people from Southern Hills and Fraser Range would come to meet. Nobody should disturb this area by clearing the bush or drilling or digging close by.
13. East of Milky Well there is a **rockhole near a rock shaped like a mountain devil**. The *Marlpa* people used to camp there and we still go there to collect water.
14. Nobody should damage these rocks by digging or drilling at them.
15. **Duncan's Lookout** is on the highway near the eastern edge of the tenement. There is a rockhole there and it was a camping place where the old *Marlpas* used to stay and meet up. There were lots of carpet snakes here and we *Marlpas* would dig them out and eat them. At Duncan's Lookout you can look out across to Southern Hills and Fraser Range. My father's brother Duncan Graham used to live out there and carry the mail between Newman's Rock and New Well on Fraser Range.
16. Nobody should disturb this place by clearing the bush or digging or drilling.

17. The **granite rock** near the Southern Hills homestead is very special. There is a rockhole there, where lots of *Marlpa* people used to camp. *Marlpa* babies were born there. *Marlpa* people would do corroborees there too.
18. Nobody should disturb this area by clearing the bush or digging or drilling.
19. There are lots of freshwater soaks and campsites around the **Milky Well** area. Lots of the *Marlpa* people used to camp out there in the old days. There would be lots of stone tools around there too.
20. Nobody should disturb this area by clearing the bush or digging or drilling.
21. There is a **sacred men's site** in the area near Healys Dam. I know where it is in the tenement, but I want to protect it so I won't say specifically where it is. There is a very special rock there and *Marlpa* men used to do ceremonies there. Women have to stay away from places like this.
22. Nobody should move the rock or damage the site by digging or drilling nearby.
23. On the south side of Ten Mile Rocks, within the tenement, there are **initiation grounds**, where *Marlpa* initiations were done. There is a cleared space where all the sticks and stones have been removed, and there are many old campfires around it.
24. It's a very special *Marlpa* place, and when you camp here you can feel the spirits at night.
25. Nobody should clear the bush or dig or drill anywhere near this place.'

[24] The affidavit of Mr James Schultz is made in the following terms:

'I, James Terrence Schultz, of 115 Roberts Street, Norseman, in the State of Western Australia, being duly sworn, make oath and say as follows:

1. My name is James Terrence Schultz. I am 44 years old.
2. I am a *Marlpa* person and a member of the Ngadju native title claim group. *Marlpa* and Ngadju are two different names for the same people.
3. I am *Marlpa* because my ancestors are *Marlpa*. My father, Les Schultz, was *Marlpa*. So were both of his parents, Mick Schultz and Patsy Dimer.
4. I am able to speak about the site I talk about below because my father handed knowledge about it down to me.
5. My father and other *Marlpa* elders took me out to Southern Hills when I was a child. While we were there they would tell me all the old stories and teach me about the special areas in our country. I often take my children out to the area to teach them about their country and their ancestors.

Areas or sites of particular significance

6. I have seen a map of the proposed tenement E63/1380. I know of a special place in that area, near the Southern Hills homestead.
7. The **granite rock** near the Southern Hills homestead is very special. There is a rockhole there.
8. At the right time of the year, when the moon is right, if you drink from the rockhole, it can heal you or help women to get pregnant.
9. *Marlpa* people would live near the rockhole because there was lots of food there such as wild turkeys, kangaroo and emu.
10. Water is very special to the *Marlpa* people. We have to protect our water sources.
11. The old spirits are still at the rockhole, and they want everything to be left as it is. They get upset if you go there and make a lot of noise and don't respect the land.
12. Nobody should disturb this area by clearing the bush or digging or drilling.'

[25] All of this sworn evidence is uncontested and I accept that each person has the authority to speak on behalf of the native title party.

Community or social activities (s 237(a))

[26] The Tribunal is required to make a predictive assessment of whether the grant of the proposed licence and activities undertaken pursuant to it are likely to interfere with the community or social activities of the native title party (in the sense of there being a real risk of interference) (see *Smith v Western Australia and Another* (2001) 108 FCR 442; [2001] FCA 19 at 449-450 [23] ('*Smith*'). Direct interference involves an evaluative judgement that the future act is likely to be the proximate cause of the interference and must be substantial and not trivial in its impact on community or social activities (*Smith* at 451 [26]). The assessment is also contextual, taking into account other factors which may already have had an impact on a native title party's community or social activities (such as mining or pastoral activity) (*Smith* at 451-452 [27]).

[27] The evidence establishes that some prospecting, mining and exploration activity has occurred in the area of the proposed licence between approximately 1977 and 2010 – this activity overlapped the proposed licence by between less than one per cent, up to 20.9 per cent, with the majority of overlaps being under five per cent. There are currently two pastoral leases which overlap by 30.3 and 66.8 per cent respectively, two live mining tenements (both overlapping at 0.3 per cent each) and four live exploration tenements overlapping by between 0.1 per cent and 14.1 per cent each. I accept that these activities will already have interfered, to some extent, with any traditional, community or social activities of the native title party.

[28] In relation to community and social activities over the proposed licence area, the native title party contentions and the three sworn affidavits focus their evidence on s 237(b), rather than on any interference with the carrying on of community or social activities as required by s 237(a).

[29] The Tribunal must have regard to the fact that the grantee party's access to the area would be temporary and limited to the areas in which exploration is taking place, as significant ground disturbing exploration will only occur at any one time over a small area. In general, the Tribunal has found that, because of its relatively limited and temporary nature, exploration activity is not likely to directly interfere with a native title party's community or social activities except in an incidental and insubstantial way. I believe this is such a case.

[30] Taking all of these factors into account I find that exploration activity in relation to the proposed licence E63/1380 is not likely to directly interfere with the community or social activities of the native title party in a substantial or more than trivial way.

Sites of particular significance (s 237(b))

[31] The issue the Tribunal is required to determine in relation to s 237(b) is whether there is likely to be (in the sense of a real risk of) interference with areas or sites of particular (that is, more than ordinary) significance to the native title party in accordance with their traditions. As stated, DIA documentation shows five registered sites within the proposed licence, and five other heritage places registered with DIA, but this does not mean there may not be other sites or areas of particular significance to the native title party over the area of the proposed licence or in the vicinity. The Register does not purport to be a record of all Aboriginal sites in Western Australia and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters. The *Aboriginal Heritage Act 1972* (WA) ('AHA') protects all Aboriginal sites, whether on the Register or not.

[32] The Government party relies on: relevant aspects of its regulatory regime under the *Mining Act 1978* (WA) (including ss 24, 29, 63); the AHA (including ss 5, 17, 18); the *Aboriginal Affairs Planning Authority Act 1972* (WA) (including s 31) and associated *Regulations*; the standard conditions to be imposed on exploration licences; and the additional conditions/endorsements, to contend that there is not likely to be interference with sites of significance. The grantee party relies on the Government party materials.

[33] The regulatory regime based on the AHA has been described on numerous occasions by the Tribunal (see *Maitland Parker* (at [31]-[38], [40]-[41])). While the Tribunal has often found that the site protective regime based on the AHA is sufficient to ensure that interference with sites of particular significance is unlikely, each matter must be considered on its own facts (see *Butcher Cherel and Ors on behalf of the Gooniyandi Native Title Claimants/Western Australia/Faustus Nominees Pty Ltd* [2007] NNTTA 15 at [81]-[91]). The Tribunal must consider, based on the facts of a particular case and the nature and extent of sites of particular significance, whether this protective regime is sufficient to make it unlikely that there will be interference with sites of particular significance which are found to exist.

[34] In relation to s 237(b), the affidavits offer evidence relating to sites of particular significance to the native title party. The evidence of Mr John Graham includes:

- A burial site just inside the Southern Hills boundary fence (at 9-12);
- A burial site near the Southern Hills shearing shed (at 13-16);
- A rock hole at a granite hill near the Southern Hills homestead, which was previously used for camping and water, where people were born and died, and where dancing occurred until approximately the 1930s (at 17-20);
- A sacred rock near the road going north from the old Southern Hills homestead to Bullock Hill, which is a sacred men's site, where men 'used to do ceremonies' (at 21-23); and
- The Mount Malcolm site, which is 'a very special Ngadju site' used previously for camping and water and 'Ngadju people still have responsibility to look after it' (at 24-26).

I note from the DMP evidence and Tribunal mapping, that: the registered or other sites 17232, 1139, 1096, and 1095 are very near Southern Hills; the boundary to site 2876 is near the Bullock Hill Dam (which I presume to be near Bullock Hill); and sites 1342 and 1341 are on or very near Mount Malcolm. Site 17232 is listed by DIA as being a burial/skeletal site called Southern Hills Burial – I infer that at least one of the burial sites referred to in Mr John Graham's affidavit may correspond to site 17232.

[35] The evidence of Mr John Walter Graham (Danny Graham) states that there are a 'lot of important sites' in that tenement (at 7), which include:

- A grave south west of Rule's Dam (Rurell Well) (at 8 and 10);
- A grave south west of Peters Hole (at 9 and 10);
- A rockhole at Gnama Hill, where the old people used to live, camp and hunt, which is 'very special' because it is where the people from Southern Hills and Fraser Range would come to meet (at 11 and 12);
- A rockhole shaped like a mountain devil east of Milky Well, where people used to camp and still go to collect water (at 13 and 14). There are also freshwater soaks

and campsites around the Milky Well area where people used to camp in ‘the old days’, which would also contain lots of stone tools (at 19 and 20);

- Duncan’s Lookout, on the highway, near the eastern edge of the tenement, which is also near a rockhole and which was a camping place and hunting place for carpet snakes (at 15 and 16);
- Granite Rock near Southern Hills Homestead, which is ‘very special’. There is a rockhole there where people used to camp, birth and do corroborees (at 17 and 18);
- A sacred men’s site near Healys Dam, which Mr Graham would not say specifically where it was to protect it as there is also a special rock where men did ceremonies (at 21 and 22); and
- Initiation grounds on the south side of Ten Mile Rocks, on the tenement, where there are many old campfires and where ‘sticks and stones have been removed ... and when you camp here you can feel the spirits at night’ (at 23-25).

[36] I note from the DMP evidence and the Tribunal mapping, that:

- Site 1286 is south west of Rurel Well, but is noted as an artefacts/scatter site – the burial site Mr Graham refers to may be part of this complex but as yet not registered, or may be in another area near this site;
- Site 17230 is south west of Peters Hole, but is noted as an artefacts/scatter/camp/hunting place/water source – the burial site Mr Graham refers to near Peters Hole may be part of this complex but as yet not registered, or may be in another area near this site;
- The rockhole near Gnama Hill could be site 17230; and
- There is a site east of Milky Well (site 1286) and Mr Graham’s evidence suggests this site may be part of a number of old campsites.

Mr Graham outlines a number of sites and areas of particular significance to the native title party, some of which appear to correspond to known DIA sites, and others which do not. Mr John Graham and Mr John Walter Graham both refer to ‘important’ sites within this proposed licence, which I interpret as being sites which are of more than ordinary significance, or, in the terms of s 237(b), sites of particular significance.

[37] In his evidence, Mr Schultz states that he knows of ‘a special place in that area near the Southern Hills homestead’, which is the granite rock near the Southern Hills homestead, which he refers to as being ‘very special’ and which has a rockhole which ‘[a]t the right time of the year, when the moon is right, if you drink from the rockhole, it can heal you or help women to get pregnant’ (at 6-8). He states that people would live near this rockhole near the Southern Hills Homestead because there was a lot of food such as wild turkeys, kangaroo and emu, and the water sources need to be protected. He states ‘[t]he old spirits are still at the rockhole, and they want everything to be left as it is. They get upset if we go there and make a lot of noise and don’t respect the land’ (at 9-11). He also states the area would be disturbed by clearing the bush, digging or drilling (at 12). By ‘very special’, I take it the site Mr Schultz refers to is of more than ordinary significance to the native title party, or, in terms of s 237(b), a site of particular significance. I take Mr Schultz’s use of ‘very special’ to be similar in meaning to the other deponents referring to ‘important’ sites.

[38] The evidence of each of the deponents has identified a number of sites, some common to each other’s affidavits and some which are not, which are of particular significance to the native title party.

[39] The native title party contentions support the affidavit evidence. The contentions provide commentary and a map which, among other things, outlines the significance of: the granite rock near the Southern Hills homestead; the DIA registered site Gnama Hill; the grave sites; the DIA registered Mount Malcolm site; the secret sacred rocks; the rockhole east of Milky Well; Duncan’s Lookout; and the initiation grounds on the southern side of Ten Mile Rocks.

[40] The native title party contentions argue that the Government party’s site protection regime is not effective because the tenement contains areas of inherent spiritual significance including a large number of sites, sacred ceremonial sites with gender restrictions and fertility implications, remains of ancestors and birth places and camp grounds which are ‘still imbued with the spiritual presence of Ngadju ancestors’ and refers to the problems relating to interference with the sites in terms of spiritual implications (at 16). The native title party contentions argue that ‘[w]here the existence of sites of particular significance within the tenement is accepted, but the precise location or extent of sites is not known, the Tribunal has found that the expedited procedure does not apply unless the grantee party is able to indicate how it will avoid interfering with these sites’ and in support, cites *Bruce Monadee and Others*

on behalf of the Ngaluma Injibandi/Western Australia/Auriferous Mining Pty Ltd, Red Bluff Nominees Pty Ltd [2002] NNTTA 115 (at [20]) (*Monadee*). While I do not believe this is precisely the argument in *Monadee* (at [20]), I accept the general thrust of the argument is consistent with *Monadee*, and that it does have application to the present determination.

[41] In relation to intentions, the grantee party in this matter has indicated its reliance on the State's contentions and evidence. The State's contentions follow the usual formula and are not of a great deal of assistance in understanding the intentions of the grantee party in relation to the proposed licence. The Government party contentions state (at 12):

‘A predictive assessment allows the Tribunal to receive evidence of a grantee party's intention where that evidence is adduced. In the absence of any intention, the Tribunal would be at liberty to assume that a grantee party will fully exercise the rights conferred by the tenement. This assumption does not necessarily result in a finding that there is a likelihood of interference or major disturbance as the legal regime may require the grantee party to operate in a manner designated to minimise the risk of interference or major disturbance: see *Silver v NT* at [30]-[32].’

I accept the State's argument that the absence of a grantee party's intention does not automatically lead me to a finding that sites of particular significance will be subject to interference. However, in the absence of any particular evidence from the grantee party as to how they will fully exercise their rights, the Government party (at 24) argues that the Tribunal may consider evidence as to what extent the grantee party will go in ensuring that the risk of interference is minimised and refer to *Silver and Others v Northern Territory of Australia and Others* (2002) 169 FLR 1; [2002] NNTTA 18, stating in that determination there appeared to be a genuine desire on the part of the grantee party to ensure that any exploration activities be conducted in a culturally sensitive manner. In the present matter, there is no detail from the grantee party in relation to how they will exercise their exploration activities, either generally, or in relation to sites or areas of significance or of particular significance to the native title party.

[42] Similar to the Tribunal's finding in *Evelyn Gilla and Others on behalf of Yugunga-Nya/Western Australia/Blackjack Resources Pty Ltd* [2002] NNTTA 35, the existence of registered sites in the vicinity, along with areas outlined in the affidavits, corroborates the importance of the area to the native title party, which contains sites of particular significance.

[43] I must now consider whether the intentions of the grantee party, the protective provisions and procedures of the AHA, and any other protective arrangement that may be in

place, render it unlikely that there will be interference with any areas or sites of particular significance.

[44] I note that there is no evidence to suggest that the grantee party will not act lawfully and in accordance with the AHA. In making the predictive assessment for s 237(b) of the Act, the Tribunal can have regard to the grantee party's attitude to the RSHA (*Champion v Western Australia and Another* (2005) 190 FLR 362 [2005] NNTTA 1 at 386-388 [30]-[34]). The RSHA in this matter is to be executed in favour of Narnoobinya rather than Ngadju, the latter being the native title party, although the request for execution can be made by the Ngadju (unlike WO10/1154 (*John Graham & Ors on behalf of Ngadju/Western Australia/Mulciber Metals Pty Ltd* [2011] NNTTA 165) where a similar RSHA clause was to be both requested by and executed in favour of the Narnoobinya where the native title party was Ngadju).

[45] The uncontested evidence of the native title party is compelling in that the proposed licence and its close surrounds contains a number of sites of particular significance and I am not confident in this matter that the regulatory regime will operate to eliminate the likelihood that sites of particular significance may be interfered with, particularly those which have not yet been recorded or registered with the DIA. I am of the opinion that this is a case where the negotiation process available under s 31 of the Act should take place to avoid the likelihood of interference with sites of particular significance on this proposed licence.

[46] I find that there is likely to be a real risk of interference with sites of particular significance to the native title party in the proposed licence area, and as such the act is not an act which attracts the expedited procedure.

Major disturbance to land and waters (s237(c))

[47] As the evidence in relation to s 237(b) of the Act supports a determination that the expedited procedure is not attract in relation to E63/1380, it is not necessary to consider whether major disturbance to land and waters is likely to occur.

Determination

[48] The determination of the Tribunal is that the grant of exploration licence E63/1380 to Mulciber Metals Pty Ltd is not an act attracting the expedited procedure.

Helen Shurven

Member

18 August 2011