

NATIONAL NATIVE TITLE TRIBUNAL

***Raymond Ashwin on behalf of the Wutha People and Another v Nearology Pty Ltd and Another* [2014] NNTTA 81 (6 August 2014)**

Application No: WO2013/0787, WO2013/0867

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

- and -

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

Raymond Ashwin & Ors on behalf of Wutha (WC1999/010) (first native title party)

- and -

Evelyn Gilla & Ors on behalf of Yugunga-Nya (WC1999/046) (second native title party)

- and -

The State of Western Australia (Government party)

- and -

Nearology Pty Ltd (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 6 August 2014

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act likely to interfere directly with the carrying on of community or social activities – whether act likely to interfere with sites of particular significance – whether act likely to involve major disturbance to land or waters - expedited procedure attracted

Legislation: *Native Title Act 1993* (Cth), ss 29, 30, 31, 32, 146, 151(2), 237
Mining Act 1978 (WA)
Aboriginal Heritage Act 1972 (WA)
Acts Interpretation Act 1901 (Cth), s 36(2)

Cases:

Ashwin and Others on behalf of the Wutha People v Peter Romeo Gianni and Another [\[2014\] NNTTA 23](#) ('Ashwin v Gianni 2')

Ashwin and Others on behalf of the Wutha People v Regis Resources Ltd [\[2014\] NNTTA 39](#) ('Ashwin v Regis Resources')

Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd [\[2014\] NNTTA 22](#) ('Tullock v Bushwin')

Little v Oriole Resources Pty Ltd (2005) [146 FLR 576](#); [\[2005\] FCAFC 243](#) ('Little v Oriole Resources')

Raymond William Ashwin and Ors on behalf of the Wutha People/Western Australia/Cliffs Asia Pacific Iron Ore Pty Ltd [\[2013\] NNTTA 122](#) ('Ashwin v Cliffs Asia Pacific')

Raymond William Ashwin and Ors on behalf of the Wutha People/Western Australia/Doray Minerals Limited [\[2013\] NNTTA 68](#) ('Ashwin v Doray Minerals Limited')

Raymond William Ashwin and Ors on behalf of the Wutha People/Western Australia/Peter Romeo Gianni [\[2013\] NNTTA 88](#) ('Ashwin v Gianni 1')

Smith v Western Australia (2001) 108 FCR 442; [\[2001\] FCA 19](#) ('Smith v Western Australia')

Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd & Anor [\[2014\] NNTTA 8](#) ('Yindjibarndi Aboriginal Corporation v FMG Pilbara')

Representative of the native title party:

Mr Paul Tolcon, Mony De Kerloy Barristers & Solicitors
Ms Louise Keepa, Yamatji Marlpa Aboriginal Corporation

Representatives of the Government party:

Mr Jeff O'Halloran, State Solicitor's Office
Mr Nicolas Damjanovic, State Solicitor's Office
Mr Matthew Smith, Department of Mines and Petroleum

Representatives of the grantee party:

Ms Lydia Brisbout, McMahon Mining Title Services Pty Ltd

REASONS FOR DETERMINATION

- [1] On 10 April 2013, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E51/1556 ('the proposed licence') to Nearology Pty Ltd ('the grantee party'). The notice includes a statement that the Government party considers the grant attracts the expedited procedure (that is, that the proposed licence is an act that can be done without the normal negotiations required by s 31 of the Act).

- [2] The s 29 notice describes the proposed licence as comprising 42 graticular blocks (approximately 134.2976 square kilometres), located 56 kilometres south of Meekatharra, in the Shires of both Cue and Meekatharra.

- [3] An objection to the inclusion of the expedited procedure statement may be made to the National Native Title Tribunal ('the Tribunal') within 4 months of the 'notification day' (see s 32(3) of the Act). As explained by ss 32(3) and s 30(1)(a) and (b), the objection may be made by any registered native title claimant in respect of the relevant land or waters who is registered at four months from the notification day provided the claim was filed before the end of three months from the notification day.

- [4] The notification date for this matter was 10 April 2013. The three month period for filing a native title claim was 10 July 2013. The four month period for lodgement of objections was 10 August 2013, and by the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the closing date for lodgement became 12 August 2013, the next working day.

- [5] The proposed licence is overlapped by the Wutha people's native title claim (WC1999/010 – registered from 15 June 1999) by 69.42 per cent. On 17 July 2013, the Wutha people ('Wutha native title party') made an expedited procedure objection application to the Tribunal in relation to the proposed licence (designated Tribunal number WO2013/0787). The proposed licence is also wholly overlapped by the Yugunga-Nya people's native title claim (WC1999/046 – registered from 12 June 2000). On 8 August 2013, the Yugunga-Nya people ('Yugunga-Nya native title party') made an expedited procedure objection application to the Tribunal in relation to the proposed licence (designated Tribunal number WO2013/0867). No other native title claim was filed, or objection lodged, in respect of this proposed licence.

- [6] On 24 October 2013, I was appointed to be the Member for the purposes of determining this inquiry.

Background

- [7] Preliminary conferences were convened in relation to WO2013/0787 and WO2013/0867 on 27 August 2013 and 10 September 2013, respectively. In both cases, the grantee party representative indicated that a draft agreement had been received from the native title party representative, and the client was reviewing it.
- [8] On 18 December 2013, a status conference was held in relation to WO2013/0787, at which the grantee party requested that the Tribunal make a determination in relation to that matter. On the same day I set directions for that matter to proceed to an inquiry.
- [9] On 15 January 2014, a status conference was held in relation to WO2013/0867, at which the parties indicated that they were considering options in relation to an alternative heritage agreement. At a subsequent status conference on 29 January 2014, the grantee party requested that the Tribunal make a determination, and on 3 February 2014 I therefore set directions for an inquiry in relation to WO2013/0867.
- [10] In compliance with the directions for WO2013/0787, parties provided the following submissions and evidence: the Government party's initial evidence on 14 February 2014 through the Department of Mines and Petroleum ('DMP'); the native title party contentions on 28 February 2014 ('Wutha NTP Contentions'); the grantee party's contentions on 11 March 2014 ('GP Wutha Contentions'); and the Government party's contentions (through the State Solicitor's Office, 'SSO') on 18 March 2014 ('SSO Wutha Contentions').
- [11] In compliance with the directions for WO2013/0867, parties provided the following submissions and evidence: the Government party's initial evidence on 17 February 2014 through the DMP; the native title party contentions on 17 March 2014 ('Yugunga-Nya NTP Contentions'); the grantee party's contentions on 31 March 2014 ('GP Yugunga-Nya Contentions'); and the Government party's contentions (through the SSO) on 13 May 2014 ('SSO Yugunga-Nya Contentions').

- [12] Following receipt of the above submissions, the Tribunal sought parties' views as to whether a listing hearing was required. All parties agreed to these matters proceeding on the papers.
- [13] In the Wutha native title party's contentions (WO2013/0787), they expressed an intention to call witnesses to give oral evidence, and outlined the evidence to be given if the matter were to be decided otherwise than 'on the papers' pursuant to s 151(2) of the Act. Specifically, the native title party stated (at 11 Wutha NTP Contentions) that it intended to call Ms June Ashwin and Mr Geoff Ashwin, to give certain evidence.
- [14] The native title party's contentions do not state the qualifications of the proposed witnesses, though I do note that Ms Ashwin and Mr Ashwin are registered claimants - they are two of the four named persons who comprise the Applicant for the Wutha native title party's native title determination application.
- [15] The Wutha native title party's statement of contentions appears to be based on a pro forma document submitted in previous expedited procedure matters involving the Wutha People, with the only noticeable differences being the tenement details. The circumstances of this matter, in terms of the native title party not providing evidence to support its contentions, are also very similar to a number of previous expedited procedure determinations involving the Wutha People made by the Tribunal. It appears that the native title party has developed a standard practice of stating in their contentions that they will provide oral evidence, but no such evidence is provided (see *Ashwin v Regis Resources*; *Ashwin v Gianni 1*; *Ashwin v Gianni 2*; *Ashwin v Doray Minerals Limited*; *Ashwin v Cliffs Asia Pacific*).
- [16] The Government party has included in its submissions that in its view, the issues for determination in these proceedings can be adequately determined in the absence of the parties and do not require an oral hearing. Taking into account the principles outlined by Member O'Dea in *Ashwin v Doray Minerals Limited* (at [11]-[13]), and that there was no objection to proceeding with the inquiry 'on the papers', I have proceeded with this matter accordingly.
- [17] On 12 May 2014, the Yugunga-Nya native title party advised the Tribunal all parties that 'the RSHA condition upon grant will be sufficient' and once 'confirmation that the condition will be in place upon grant I will withdraw the objection'. As at the date of this decision, the objection has not been withdrawn by this native title party.

[18] A map of the proposed licence area prepared by the Tribunal's geospatial services was circulated to parties, and no party objected to its use for the purposes of these proceedings.

Legal principles

[19] Section 237 of the Act provides:

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.

[20] In relation to the legal principles to be applied in this matter, I adopt those outlined by President Webb in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* at [15]-[21].

Evidence in relation to the proposed act

[21] The Government party provided the following documents in relation to each of the proposed objections:

- A Tengraph plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity of the proposed licence;
- Reports and plans from the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs ('DAA Database');
- A copy of the proposed licence application;
- A Draft Tenement Endorsements and Conditions Extract; and
- A Tengraph quick appraisal detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features within the proposed licence.

[22] The Tengraph quick appraisal establishes the underlying land tenure within the proposed licence to be as follows:

- Reserves for ‘water’ and ‘common’ purposes (CR 10306, CR 5571 and CR 13435), overlapping the proposed licence at 17.4 per cent;
- Pastoral Lease 3114/744 (Cogla Downs), overlapping the proposed licence at 34.9 per cent;
- Pastoral Lease 3114/455 (Cullculli), overlapping the proposed licence at 32.4 per cent; and
- Pastoral Lease 3114/550 (Polelle), overlapping the proposed licence at 17.6 per cent.

[23] The quick appraisal shows that the proposed licence has previously been subject to the following mineral tenure:

- 14 expired or surrendered exploration licences in operation between 1991 and 2014, overlapping the proposed licence between 0.2 per cent and 100 per cent;
- 48 surrendered, forfeited or null and void gold mining leases in operation between 1895 and 1991, overlapping the proposed licence by less than 0.1 per cent and 0.1 per cent;
- Seven surrendered mining leases in operation between 1985 and 1999, overlapping the proposed licence between less than 0.1 per cent and 6.5 per cent;
- 130 mineral claims in operation between 1970 and 1984, overlapping the proposed licence between less than 0.1 per cent and 0.9 per cent;
- One surrendered mineral lease in operation between 1981 and 1991, overlapping the proposed licence by less than 0.1 per cent;
- One forfeited miner’s homestead lease in operation between 1913 and 1915, overlapping the proposed licence by less than 0.1 per cent; and
- 95 surrendered, expired or lapsed prospecting licences or prospecting areas active between 1911 and 2013, overlapping the proposed licence between 0.1 per cent and 1.5 percent.

[24] The quick appraisal outlines the following services located on the proposed licence:

- One minor road;
- 33 tracks;
- One minor manmade feature (graves);
- 10 fence lines;

- One yard;
- Eight wells/bores;
- 123 cliffs/breakaways/rockridges;
- Five non-permanent named lakes;
- One non-perennial lake; and
- 97 non-perennial minor watercourses.

[25] The report from the DAA Database shows there is one registered Aboriginal site located on the proposed licence:

- Nowthanna Hill (Site ID 7451, mythological, closed access, male restricted access only)

[26] There do not appear to be any Aboriginal communities within the proposed licence or the surrounding areas.

[27] The Draft Tenement Endorsement and Conditions Extract indicates the proposed licence will be subject to the standard four conditions imposed on the grant of all exploration and prospecting licences in Western Australia (see *Tullock v Bushwin* [11]-[12]). These are:

1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
2. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.
3. 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.
4. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of drilling rigs, 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.

[28] A further three conditions will also be imposed:

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. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Water Reserve 13435.

[29] The following draft endorsements (which differ from conditions in that the licensee will not be liable to forfeit the licence if breached) are also noted:

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 Licensee pursuant to the approval of the Minister responsible for the Mining Act 1978 under Section 111 of the Mining Act 1978 is authorised to explore for iron.
4. The grant of this licence does not include the land the subject of prior Exploration Licence 53/903. 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".

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

5. The Licensee's attention is drawn to the provisions of the:
 - Water 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
6. 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.
7. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances in accordance with the current published version of the DoWs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.

In respect to Artesian (confined) Aquifers and Wells the following endorsement applies:

8. 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 these activities has been issued by the DoW.

In respect to Waterways the following endorsement applies:

9. Advice shall be sought from the DoW if proposing any exploration 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.

In respect to Proclaimed Ground Water Areas the following endorsement applies:

10. The abstraction of groundwater is prohibited unless a current licence to construct/alter a well and a licence to take groundwater has been issued by the DoW.

- [30] The Government party have indicated they intend to impose a Regional Standard Heritage Agreement ('RSHA') condition on the proposed licence. In the contentions they have submitted for the Wutha native title party objection, which are dated 18 March 2014, the terms of the condition are as follows (at 20 SSO Wutha Contentions):

In respect of the area covered by the licence the Licensee, if so requested in writing by Wutha, the applicants in Federal Court application no. WAD 6094/98 (WC 99/10), such request being sent by pre-paid post to reach the Licensee's address, not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of Wutha the Regional Standard Heritage Agreement endorsed by peak industry groups and the Yamatji Marlpa Aboriginal Corporation.

- [31] In the contentions the Government party have submitted for the Yugunga-Nya native title party objection, which are dated 13 May 2014, the terms of the RSHA condition are as follows (at 20 SSO Yugunga-Nya Contentions):

In respect of the area covered by the licence the Licensee, if so requested in writing by the Wutha People, the applicants in Federal Court application no. WAD 6094/98 (WC 99/10), or the Yugunga-Nya People, the applicants in Federal Court Application WAD6132/98 (WC99/46), such request being sent by pre-paid post to reach the Licensee's address, not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of the Wutha People and/or the Yugunga-Nya the Regional Standard Heritage Agreement endorsed by peak industry groups and the Yamatji Marlpa Aboriginal Corporation.

- [32] Given that the RSHA condition which includes both native title parties is the one on the most recently dated Government party contentions, and that the Yugunga-Nya native title people appeared to be satisfied by the imposition of the RSHA condition, I accept that it is the condition in [31] of this decision which the Government party intends to impose of the grant of the proposed licence, rather than the RSHA condition which referred only to the Wutha native title party.

Native title party statement of contentions

Wutha native title party

- [33] The Wutha native title party state that grant of the proposed licence should not attract the expedited procedure because:

- It is likely to interfere directly with the carrying on of community or social activities of the Wutha people in relation to the land or waters concerned (s 237(a) of the Act);

- It is likely to interfere with areas or sites of particular significance to the Wutha people, in accordance with their traditions, in relation to the land or waters concerned (s 237(b) of the Act); and
- It is likely to involve major disturbance to the land or water concerned or create rights whose exercise if likely to involve major disturbance to the land or waters concerned (s 237(c) of the Act).

[34] As stated above, the Wutha native title party's contentions appear to be based on a pro forma document submitted in previous expedited procedure matters before the Tribunal. As with previous matters, the native title party has not provided any material in support of its contentions and contemplates that witnesses (Ms Ashwin and Mr Ashwin) for the native title party will give evidence in support of its contentions. As with previous matters, the native title party did not prosecute this intention in any way, either directly or through their representatives. As such I make no further comment about the evidence the native title party would or would not have given should an oral hearing have been granted.

[35] I refer to my decision in *Ashwin v Gianni 2* where the native title party contentions are almost identical to this matter (at paragraphs [26]-[32]), and adopt those paragraphs for the purpose of this matter rather than re-stating those identical contentions.

Yugunga-Nya native title party

[36] The Yugunga-Nya native title party has provided submissions which outline what they consider the Tribunal's task is in undertaking an expedited procedure inquiry, including the predictive assessment in s 237 of the Act generally, and s 237(b) of the Act in particular. That is, the Yugunga-Nya native title party state the expedited procedure should not apply because the proposed licence is likely to interfere with areas of sites of particular significance, in accordance with the traditions of the native title party, to the proposed licence area. However, they have not submitted any specific contentions in relation to sites of particular significance, if any, on the proposed licence.

[37] In relation to s 237(c), they state that they have not been provided with information concerning the grantee party's intended activities on the proposed licence, and therefore reserve their right to lead evidence supporting this ground of objection

(Yugunga-Nya NTP Contentions at 23). In this regard I note, however, that there was no further request to file submissions following the grantee party's submissions.

Grantee party contentions

[38] In both inquiries, the grantee party submits the following in relation to the intended exploration activities on the proposed licence, and in relation to the grantee party's conduct (Wutha GP Contentions at 19-29; Yugunga-Nya GP Contentions at 12-22):

- The grantee party has signed and forwarded a Regional Standard Heritage Agreement (RSHA) for the proposed licence to Yugunga-Nya and Wutha on 18 March 2013, and these offers remains open;
- The grantee party has never been prosecuted under the *Aboriginal Heritage Act 1972* (WA); and
- The grantee party submits that the RSHA more than adequately ensures the grantee party is compliant with existing law and policy, and further, that the grantee party is willing to impose additional obligations on themselves by virtue of entering into this RSHA.

The grantee party contentions in relation to Wutha

[39] The grantee party makes the following submissions in relation to the Wutha native title party materials:

Community and social activities

- Initial exploration work by the grantee party is likely to include low impact survey and sampling. If this work is successful, further work may include an initial small programme of broad spaced drill holes. Any more intensive drilling programmes are likely to be confined to relatively small target areas within the proposed licence, and are not likely to take longer than a few weeks to conduct (at 30 GP Wutha Contentions);
- Given the low-level, temporary nature of the exploration work to be conducted on the proposed licence, the grantee party submits that any interference with community or social activities will not be substantial (at 31 GP Wutha Contentions);

- Given the extensive nature of the Wutha claim area (3,268,778.15 Ha) relative to the proposed licence (13,426.73 Ha), there will remain large tracts of land where community and social activities may be carried out (at 34 GP Wutha Contentions);
- Given that there have been about 300 previous tenements on the proposed licence, it is likely that any community and social activities are already subject to, or coexistent with, the lawful activities of pastoral leaseholders and tenement holders (at 37 GP Wutha Contentions); and
- No substantive evidence has been offered in support of the carrying on of any relevant community or social activities within the proposed licence by members of the native title party, or that the grant of the proposed licence is likely to interfere directly with the physical aspects of these activities (at 40 GP Wutha Contentions).

Sites of particular significance

- The Wutha native title party's contentions do not provide details or evidence of how the grant of the proposed licence is likely to interfere with specific sites of particular significance (at 73 GP Wutha Contentions);
- While providing a general statement as to the Wutha native title party's concerns, their contentions do not provide information or evidence of specific sites of significance with the proposed licence area, or any likely physical interference with these sites as a result of the grant of the proposed licence (at 75 GP Wutha Contentions); and
- The Wutha native title party's contentions contain general statements about its concerns regarding exploration activity, rather than evidence that the specific grantee party in undertaking a particular act will not comply with the State's regulatory regime (at 76 GP Wutha Contentions).

Major disturbance to land

- The Wutha native title party contentions seem to relate to the impact that the grant of the proposed licence may have on Aboriginal people who may use the land, rather than referring to particular rights or acts which are likely to involve major disturbance to the land itself (at 80 GP Wutha Contentions);
- The Wutha native title party has not provided evidence on the manner in which the grant of the proposed licence is likely to involve major disturbance, or the

manner in which the existing regulatory regime is insufficient to protect against major disturbance (at 81 GP Wutha Contentions); and

- The proposed licence is greatly affected by existing pastoral leases, and has already been subject to a large number of prospecting and mining tenements (at 82-83 GP Wutha Contentions).

The grantee party contentions in relation to Yugunga-Nya

[40] The grantee party makes the following submissions in relation the Yugunga-Nya native title party materials:

Community or social activities

- The grantee party is likely to undertake low-impact soil and rock chip sampling as part of initial investigations into the potential of the proposed licence to host mineralisation worth further investigation. Follow up work is likely to include a relatively small number of broad-spaced RC and AC drill holes. Only following success with such early stage work is it likely that denser drilling will be undertaken (at 2(37)1 GP Yugunga-Nya Contentions);
- Given the low-level, temporary nature of any exploration work to be conducted on the proposed licence, and the strict rehabilitation requirements imposed on any such work, the grantee party submits that any interference with community or social activities would not be substantial (at 3(38) GP Yugunga-Nya Contentions);
- Given the extensive size of the Yugunga-Nya claim area (3,029,626.32 Ha) relative to the proposed licence area (13,426.72 Ha), there will be large tracts of land where community and social activities related to the native title rights and interests may be carried out (at 6(41) GP Yugunga-Nya Contentions);
- The proposed licence has been subject to a large number of previous tenements and is currently impacted by pastoral leases. It is, therefore, likely that any community and social activities are already subject to, or coexistent with, the lawful activities of pastoral leaseholders (at 8(43) GP Yugunga-Nya Contentions); and

¹ I note the numbering in the grantee party contentions for WO2013/0867 runs 1-35 ('the first group of numbers'), and then recommences again at 1-48 ('the second group of numbers') later in the document. To provide clarity, I have added numbers 36-83 in brackets after any number references in 'the second group of numbers' (1-48), to indicate the correct number had they continued to run consecutively.

- No substantive evidence has been offered in support of the carrying on of any relevant community or social activities within the proposed licence by members of the native title party, or that the grant of the proposed licence is likely to interfere directly with the physical aspects of these activities (at 12(47) GP Yugunga-Nya Contentions).

Sites of particular significance

- The Yugunga-Nya native title party have not provided any evidence that the grant of the proposed licence is likely to interfere with sites of particular significance (at 39(74) GP Yugunga-Nya Contentions);
- No evidence has been provided of specific sites of significance within the proposed licence area, or of any likely physical interference with these sites as a result of the grant (at 41(76) GP Yugunga-Nya Contentions); and
- The Yugunga-Nya native title party's evidence contains general statements about its concerns regarding exploration activity, rather than evidence that the specific grantee party undertaking a particular act will not comply with the State's regulatory regime (at 42(77) GP Yugunga-Nya Contentions).

Major disturbance to land

- No evidence has been provided that the grant of the proposed licence will create rights likely to involve major disturbance to land or waters (at 45(80) GP Yugunga-Nya Contentions).

Government party contentions and evidence

[41] The Government party states it proposes to impose the endorsements and conditions set out in the Draft Tenement Endorsement and Conditions Extract (at 18, both SSO Contentions). It also states that it intends to impose a condition requiring the grantee party to enter into a Regional Standard Heritage Agreement if requested by either native title party within 90 days from the grant of the proposed licence ('RSHA condition') (at 20, both SSO Contentions, and as outlined at [30]-[32] of this decision).

[42] The Government party states, in the absence of evidence to the contrary, the Tribunal must assume that a grantee party will not act in breach of the relevant statute law,

regulations or conditions imposed upon them (at 23 SSO Wutha Contentions; at 22 SSO Yugunga-Nya Contentions).

Government party's contentions in relation to s 237(a)

- [43] The Government party submits there no evidence to support either native title party's assertions that certain community and social activities are carried out on the proposed licence (at 51 SSO Wutha Contentions; at 31 SSO Yugunga-Nya Contentions). The Government party also submits (at 53 SSO Wutha Contentions; at 32 SSO Yugunga-Nya Contentions) there is not likely to be direct interference with such activities given: the grantee party has stated most of its proposed exploration activities will be low impact and non-intrusive, and conducted in a manner which will respect local Aboriginal cultural concerns and not adversely impact heritage sites; the grantee party's willingness to enter into an RSHA which provides for consultation prior to ground disturbing activities; previous mineral exploration in the area; the overlap of historical and existing pastoral leases which the native title party's activities have already been subject to; there are no Aboriginal communities within the area; and that exploration activities are inherently capable of coexistence with community and social activities of a native title party.

Government party's contentions in relation to s 237(b)

- [44] The Government party correctly states that neither native title party has produced any evidence regarding sites or areas of particular significance (at 65 SSO Wutha Contentions; at 35 SSO Yugunga-Nya Contentions). It states that interference is not likely because there has been previous mineral exploration in the area and the activities contemplated by the grantee party would be the same as, or no more significant than, the previous and continuing use of the area (at 67 SSO Wutha Contentions; at 36(a) SSO Yugunga-Nya Contentions). It also contends the State's regulatory regime under the AHA is likely to prevent interference with any area or site of particular significance (at 68 SSO Wutha Contentions; at 36(b) SSO Yugunga-Nya Contentions) and that the grantee party has indicated its intention of abiding by the AHA (at 69 SSO Wutha Contentions; at 36(b) Yugunga-Nya Contentions).
- [45] The Government party also outlines that the grantee party has stated most of its proposed exploration programme activities will be low-impact (at 36(e) SSO

Yugunga-Nya Contentions) and the work that is ground disturbing will be broad based and would only be considered minor (at 66(e) SSO Wutha Contentions).

- [46] The Government party notes that only a small portion of the Nowthanna Hill mythological site overlaps the proposed licence, and submits there is thus a low risk of impact to, or interference with, that site (at 36(f) SSO Yugunga-Nya Contentions). Furthermore, the grantee party is on notice of the existence of the Nowthanna Hill site and of its legal obligations in respect of that site (at 36(d) SSO Yugunga-Nya Contentions).

Government Party's contentions in relation to s 237(c)

- [47] The Government party states this limb of s 237 is only attracted when there is a significant, direct physical disturbance of land or waters (at 76 SSO Wutha Contentions), and that the grant of the proposed licence is not likely to involve such disturbance because (at 78 SSO Wutha Contentions; at 39 SSO Yugunga-Nya Contentions): the grantee party has stated that most of the proposed exploration will be low impact and non-intrusive; any ground disturbing activities (such as drilling) are intended to be conducted in a way which will not adversely impact on heritage sites; the State's regulatory regimes will likely avoid any such major disturbance; the Government party intends to impose conditions and endorsements on the proposed licence; the proposed licence has been subject to previous mineral exploration; and there is an absence of any particular characteristics on the proposed licence that would be likely to result in disturbance to land or waters from the activities of the grantee party (at 78). Again, I accept these arguments in the absence of contrary evidence from the native title parties.

Considering the Evidence in context of s 237 of the Act

Interference with community or social activities – s 237(a)

- [48] The Tribunal is required to make a predictive assessment as to 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* at [23]). The notion of direct interference involves an evaluative judgment 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 v Western Australia* at [26]). The assessment is also contextual, taking into account other factors which may have already had an impact on a native title party's community or social activities (such as mining or pastoral activity) (*Smith v Western Australia* at [27]).

- [49] I accept the Government and grantee parties' arguments that the native title party has not made out any likely interference with community or social activities, even assuming the grantee party was to assert the full suite of rights available to it. As such, I conclude it is unlikely that the grantee party activities will interfere with the community or social activities of the native title party for the purposes of s 237(a) in this matter.

Interference with sites or areas of particular significance – s 237(b)

- [50] In relation to s 237(b), the issue the Tribunal is required to determine is whether there is likely to be (in the sense of a real chance or 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.
- [51] I accept the Government and grantee parties' arguments that the native title parties have not provided evidence to suggest there are sites or areas of particular significance on the proposed licence. Even had there been such sites, based on the available evidence, I accept the State's regulatory regime in this matter would have been sufficient to protect such sites given: the previous mineral exploration activity over the area; the Government party will impose the RSHA condition on grant; and the grantee party's contentions in support of its approach, including its willingness to adopt the RSHA. As such, I conclude there is not likely to be a real chance or risk of interference with sites or areas of particular significance in this matter for the purposes of s 237(b).

Major disturbance to land or waters – s 237(c)

- [52] The Tribunal is required to make an evaluative judgment of whether major disturbance to land and waters is likely to occur (in the sense that there is a real risk of it) from the point of view of the entire Australian community, including the

Aboriginal community, as well as taking into account the concerns of the native title party (see *Little v Oriole Resources* at [41]-[57]).

- [53] I agree with the Government party and grantee party that the native title parties have not made out any particular features or aspects on the proposed licence in this matter, and I conclude a real risk of major disturbance to land or waters is unlikely to occur, based on the available evidence for the purposes of s 237(c).

Determination

- [54] The determination of the Tribunal is that the act, namely the grant of exploration licence E51/1556 to Nearology Pty Ltd, is an act attracting the expedited procedure.

Helen Shurven
Member
6 August 2014