NATIONAL NATIVE TITLE TRIBUNAL

John Walter Graham and Others on behalf of Ngadju v Dunstan Holdings Pty Ltd **[2014] NNTTA 84 (12 August 2014)**

Application No: **WO2013/0963 & WO2013/0964**

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 and Others on behalf of Ngadju (WC1999/002) (native title party)

- and –

The State of Western Australia (Government party)

- and -

Dunstan Holdings Pty Ltd (grantee party)

DETERMINATION THAT THE ACTS ARE ACTS ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 12 August 2014

Catchwords: Native title – future act – proposed grant of exploration licences – 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 involve major disturbance to land or waters - expedited procedure attracted

Legislation: *Native Title Act 1993* (Cth), ss 29, 31, 66, 146, 151(2), 237
Mining Act 1978 (WA)
Aboriginal Heritage Act 1972 (WA)
Acts Interpretation Act 1901 (Cth), s 36(2)

Cases: *Ben Ward & Ors on behalf of the Miriuwung-Gajerrong People/Western Australia/CRA Exploration Pty Ltd* [1996] NNTTA 9 (*'Ward v CRA Exploration'*)

Daisy Lungunan and Others on behalf of the Nyikina and Mangala People/Karajarri Traditional Lands Association (Aboriginal Corporation)Western Australia/Geotech International Pty Ltd [2013] NNTTA 129 (‘*Lungunan v Geotech International*’)

John Graham & Ors on behalf of Ngadju/Western Australia/Mulciber Metals Pty Ltd [2011] NNTTA 165 (‘*Graham v Mulciber Metals 1’*)

John Graham & Ors on behalf of Ngadju/Western Australia/Mulciber Metals Pty Ltd [2011] NNTTA 167 (‘*Graham v Mulciber Metals 2*’)

Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd [2011] NNTTA 22 (‘*Tullock v Bushwin’*)

Little v Oriole Resources Pty Ltd (2005) 146 FLR 576 *(‘Little v Oriole Resources’)*

Maitland Parker & Ors/Iron Duyfken Pty Ltd [2010] NNTTA 60 (*‘Parker v Iron Duyfken’*)

Smith v Western Australia & Anor [2001] FCA 19; (2001) 108 FCR 442 (‘*Smith v Western Australia’*)

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

Representative of the native title party:	Mr Andrew Burke, Goldfields Land and Sea Council
Representatives of the Government party:	Ms Caitlin Brandstater, State Solicitor’s Office Ms Bethany Conway, Department of Mines and Petroleum
Representative of the Grantee party:	Mr Greg Abbott, M & M Walter Consulting

REASONS FOR DETERMINATION

[1] On 8 May 2013, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act', 'NTA') of its intention to grant exploration licences E63/1623 and E63/1624 ('the proposed licences') to Dunstan Holdings Pty Ltd ('the grantee party'). The notice included a statement that the Government party considers the grants attract the expedited procedure (that is, that the proposed licences are acts that can be done without the negotiations required by s 31 of the Act).

[2] The proposed licences are in the Shire of Dundas. The location, claim overlap, and size of each proposed licence are outlined in the table below:

Proposed Licence	*Ngadju Claim Overlap*	*Approximate size (km square)*	*Location*
E63/1623	100%	2.9096	91 kilometres E of Norseman
E63/1624	100%	2.9097	94 kilometres E of Norseman

[3] The proposed licences are wholly overlapped by the Ngadju native title claim (WC 1999/002– registered from 3 March 1999).

[4] An objection to the inclusion of the expedited procedure statement may be made to the National Native Title Tribunal ('the Tribunal') within four months of the 'notification day' (see s 32(3) of the Act). Pursuant to 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. The three month closing date for both proposed licences was 8 August 2013, and the four month closing date was 8 September 2013, however, by the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the four month closing date for lodgement became 9 September 2013, the next working day.

[5] On 6 September 2013, an expedited procedure objection application in relation to each of the proposed licences was lodged with the Tribunal by John Walter Graham

and Others on behalf of Ngadju ('the native title party'). They were accepted by the Tribunal pursuant to s 77 of the Act on 23 September 2013.

[6] On 8 October 2013, a preliminary conference was held at which the grantee party representative advised they had forwarded a draft agreement to the grantee party for consideration and were awaiting instructions from their client. At the status conference on 12 February 2014, the grantee party representative advised that the grantee party wished for the matter to proceed to an inquiry before the Tribunal.

[7] On 13 February 2014, I set directions for the inquiry. Pursuant to these directions, the Government party initial evidence was provided on 4 March 2014 through the Department of Mines and Petroleum ('DMP'), and the native title party submissions were filed on 1 April 2014. The native title party submissions included the affidavits of Mr John Walter Graham and Mr Warren John Dimer, sworn on 10 February 2011 and 29 January 2011, respectively. Those affidavits had been provided to the Tribunal in previous expedited procedure objection inquiries, which I will address later in these reasons. The grantee party provided submissions on 15 April 2014 and the State Solicitor's Office provided the Government party's submissions on 29 April 2014.

[8] Although the native title party objections to the expedited procedure contain statements relating to all three limbs of s 237, the native title party contentions pursue s 237(b) only. Section 32(4) of the Act requires the Tribunal, as the arbitral body, to determine whether the act is an act attracting the expedited procedure, in light of s 237 of the Act. The criteria in s 237 define what an act attracting the expedited procedure is. Whether or not the native title party offers contentions on all limbs of s 237, I must have regard to each of those limbs in the context of the material before the Tribunal.

[9] On 16 May 2014, each of the parties confirmed via email that they did not intend to make further submissions, and agreed the matter could proceed to be heard 'on the papers' in accordance with s 151(2) of the Act. I have reviewed the material before the Tribunal and I am satisfied the matter can be adequately determined proceed 'on the papers'.

[10] A map prepared by the Tribunal's Geospatial services was circulated to parties on 10 June 2014, and no party objected to the Tribunal using the map in the course of this inquiry.

Legal principles

[11] Section 237 of the Act provides:

> **237 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.

[12] 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 acts

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

- A Tengraph plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity.
- 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.

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

E63/1623

- Pastoral Lease 3114/1137 (‘Fraser Range’) overlaps 99.7 per cent; and
- Stock Route CR 17401 overlaps 0.3 per cent.

E63/1624

- Pastoral Lease 3114/1137 (‘Fraser Range’) overlaps 77.4 per cent;
- Stock Route CR 17401 overlaps 18.1 per cent; and
- Road Reserve (Eyre Highway) overlaps less than 0.1 per cent.

[15] The quick appraisal establishes that the proposed licences have previously been subject to the following mineral tenure:

E63/1623

- Five surrendered or expired exploration licences held between 1990 to 2001, each overlapping the proposed licence at between 8.8 per cent and 100 per cent; and
- One cancelled temporary reserve, in operation between 1965 and 1967, which overlapped the proposed licence at 99.7 per cent.

E63/1624

- Four surrendered exploration licences in operation between 1994 and 2011, each overlapping the proposed licence at between 8.1 per cent and 100 per cent;
- One cancelled temporary reserve, in operation between 1965 and 1967, which overlapped the proposed licence at 77.8 per cent.

[16] The quick appraisal records no services in relation to E63/1623, and the following services in relation to E63/1624:

- Major road – Eyre Highway
- A fence line

[17] The report from the DAA Database establishes there are no registered sites or heritage places within the proposed licences.

[18] According to mapping prepared by the DMP and the Tribunal, there do not appear to be any Aboriginal communities within the proposed licences or the surrounding areas.

[19] The Draft Tenement Endorsement and Conditions Extract indicates that the proposed licences 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* at [11]-[12]), as well as two standard conditions imposed for licences overlapping pastoral or grazing leases, and a condition relating to the stock route. 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.
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 exploration activities being carried out on Stock Route Reserve 17401 which restricts the use of the reserve.

[20] In addition, E63/1624 has the further following condition:

8. 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.

[21] 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 for each proposed licence:

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.

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

3. 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
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 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:

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 these activities has been issued by the DoW.

In respect to Waterways the following endorsement applies:

7. 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:

8. 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.

[22] The Government party reply indicate it intends to impose a condition on each proposed licence requiring the grantee party to enter into a Regional Standard Heritage Agreement ('RSHA') with the native title party if requested ('RSHA condition'), in the following terms (at 20 Government party contentions):

> In respect of the area covered by the licence, the licensee, if so requested in writing by the Ngadju, the applicants in Federal Court application No. WAD6020/98 (WC99/02), 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 Ngadju the Regional Standard Heritage Agreement ("RHSA") endorsed by peak industry groups.

Native title party submissions

[23] The native title party submissions include: the affidavits of Mr John Walter Graham and Mr Warren John Dimer, each sworn on 10 February 2011 and 29 January 2011 respectively and a statement of contentions.

[24] The native title party states that it maintains its objection in relation to s 237(b) of the Act only. That is, the native title party argues that the grantee party's activities on the proposed licences are likely to interfere with areas or sites of particular significance in the proposed licences in accordance with the native title party's traditions (at 1.3). They argue that, without consultation with the Ngadju people the risk of inadvertent interference is high (at 3.21).

[25] The native title party states that the area immediately adjacent to and within tenements E63/1623 and E63/1624 is an area 'rich in sites and places of particular significance' (at 3.13). They note that:

- The area to the immediate north of the proposed licences was the subject of *Graham v Mulciber Metals 1*, in which I had determined that the grant of the tenement was not an act attracting the expedited procedure as there was likely to be a real risk of interference with sites of particular significance to the native title party (Tribunal file number WO2010/1371; tenement E63/1380) (at 3.14); and

- The area to the immediate south of the proposed licences was the subject of *Graham v Mulciber Metals 2*, in which I had determined that the grant of the tenement was not an act attracting the expedited procedure as there was likely to be a real risk of interference with sites of particular significance to the native title party (Tribunal file number WO2010/1154; tenement E63/1381) (at 3.15).

[26] The native title party state that there are seven DAA registered Aboriginal sites within a ten kilometre radius of the proposed licences, which are of great significance to the native title party. These sites are listed as follows:

a) Smithonia Rocks Artefacts (Site ID 21990)

b) Ten Mile Rocks (Site ID 1340)

c) Fraser Range Burial (Site ID 22124)

d) Fraser Range Massacre (Site ID 22125)

e) Fraser Range Lizard Trap 2 (Site ID 31735)

f) B341 Isolated Artefact (Site ID21991)

g) Fraser Range granite '150' (Site ID 1286)

[27] The native title party states it relies on the affidavit evidence previously put before the Tribunal for the purpose of determination of this matter. I note that both of these affidavits related to evidence in relation to E63/1380 and E63/1381, being tenements immediately south and north, respectively, of the proposed licences in this matter (namely E63/1623 and E63/1624, as outlined at [25] above). The content of these affidavits are summarised below.

Dimer Affidavit

[28] Mr Dimer's affidavit sworn 29 January 2011 states:

- He is a member of the Ngadju native title claim group and has authority to speak about the sites in the affidavit because he has knowledge passed down by his elders (at 4)

- He has visited Fraser Range a number of times with other Ngadju people to hunt and to learn about the sacred sites in the area (at 5)

- He has seen the map of E63/1381 and knows about some massacre sites in that area, northwest of Peter's Dam (at 6-7). He states (at 6):

> *These sites are where a lot of Ngadju were killed in the past. I was told by my cousins, Clive and Kevin Rule, who are both now deceased, that there were three or four times when up to a dozen or twenty Ngadju were killed. They were shot by white settlers, and then the bodies were burned where they were shot. Then later they moved the bones and buried them in a big grave.*

- He states that '[w]e have to stay away from areas where a lot of Aboriginal people died, because they are very taboo', with 'a lot of wild spirits hanging around these places' (at 9)

- He recalls an incident in the area of E63/1381 when he believes that a spirit in the area stopped a car from working and made noises of branches snapping in the surrounding thicket (at 10)

- He believes it would be 'very wrong for a miner to dig or drill in a massacre site' (at 11) – 'the bones of the people who were massacred would be in [E63/1381] as well and they should not be disturbed' (at 12)

Graham Affidavit

[29] Mr Graham's affidavit sworn 10 February 2011 states:

- He is a Marlpa person and a member of the Ngadju native title claim group; Marlpa and Ngadju are two different names for the same people (at 2)

- He knows the land around Fraser Range and Southern Hills very well (at 6)

- He has seen a map of E63/1380 and knows there are lot of important sites to Marlpa people in that tenement (at 7)

- There is a grave southwest of Rule's Dam (at 8), and another grave southwest of Peters Hole, which his Aunty Eileen told him is the grave of a Marlpa person (at 9). Spirits 'will get angry if they are disturbed and something might happen to whoever's responsible' (at 10).

- 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, and Marlpa people would meet on top of the hill (at 11). 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' – '[n]obody should disturb this area by clearing the bush or drilling or digging close by' (at 12).

[30] I note that the affidavits refer to tenements E63/1380 and E63/1381, which are near to the proposed licences in this matter (E63/1623 and E63/1624). The native title party states that the proposed licences contain areas of 'inherent spiritual significance' due to (at 3.20):

- The large number of sites immediately surrounding the area of the proposed licences;
- The presence of sacred ceremonial sites with gender-restrictions on access, and the presence of a water source regarded as having healing and fertility properties;
- The presence of the remains of Ngadju ancestors on the proposed licences;
- The presence of Ngadju camp grounds, imbued with the spiritual presence of Ngadju ancestors; and
- The spiritual implications of interference with the sites.

[31] The native title party argue that the sites described on the DAA Register (listed above at [26]) are unlikely to have their exact extent correctly identified by the Register. Furthermore, some of the sites of particular significance identified in this matter, such as initiation grounds and massacre sites, are not amenable to being recognised as significant by the grantee party, 'due to their potentially non-descript appearance for people who do not possess traditional Ngadju cultural knowledge'. They also state it is not appropriate for the grantee party and its employees and agents to enter such areas (at 3.21).

Grantee party submissions

[32] In summary, the grantee party makes the following contentions in relation to s 237(b) of the Act:

- The grantee party will comply with the Aboriginal Heritage Act 1972 (WA) ('AHA'), and is aware of the penalties that can be imposed. The grantee party will report any Aboriginal sites identified during exploration activities (at 2.1);
- The grantee party has never been prosecuted under the AHA (at 2.2); and

- The grantee party notes that there are no Aboriginal sites registered on the DAA Register within the proposed licences (at 2.3).

[33] The grantee party indicates it will not restrict access to the proposed licences by the native title party except if it is considered temporarily unsafe to allow access. It also states that ground disturbance will be kept to a minimum and ground will be restored as close as possible to its original state.

[34] The grantee party also notes that the tenements which the native title party's affidavits refer to relate to dead exploration licences which did not cover any of the ground the subject of E63/1623 and E63/1624.

[35] The Government party contentions (at 22) provide a signed statutory declaration signed by the grantee party representative, stating that the grantee party offered to enter into a Regional Standard Heritage Agreement (RSHA) with the native title party through an email with their representative on 10 April 2014.

[36] The grantee party has not provided evidence of its proposed exploration activities on either of the proposed licences, and I therefore will assume it intends to exercise the full suite of rights conferred by an exploration licence under the *Mining Act*.

Government party submissions

[37] The Government party contentions will be considered below in the context of my overall analysis of parties' evidence.

Considering the Evidence

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

[38] The Tribunal is required to make a predictive assessment as to whether the grant of the proposed licences 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]). 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 (see *Smith v Western Australia* at [23]).

[39] In this matter, no evidence has been provided by the native title party in relation to this criterion for either proposed licence. In the absence of such evidence, I am satisfied it is not likely that the grant of the proposed licences would interfere directly and substantially with the conduct of the social and community activities of the native title party in either of the proposed licences.

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

[40] 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. As stated above at [17], the DAA Database shows there are no registered sites in the proposed licences, and no heritage places. This does not mean there are no sites or areas of particular significance to the native title party within the proposed licences or in the vicinity. The Register of Aboriginal Sites 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.

[41] Mr Graham and Mr Dimer both indicate that they are members of the Ngadju native title claim group, and I accept they have authority to speak for the native title party in these matters.

[42] As outlined above at [26], the native title party state that there are seven DAA sites within a ten kilometre radius of the proposed licences. The native title party has not provided evidence as to how the grantee party's exploration activities on the proposed licences would affect those sites. Section 237(b) may be enlivened where the future act is likely to cause interference with a site or area of particular significance outside the land or waters concerned (*Ward v CRA Exploration*, at [4]). However, I am not satisfied that a link between the sites raised in the evidence, and the likely effect of the

grantee party's exploration activities on the proposed licences, has been established on the evidence.

[43] As noted above at [31], the native title party state that the DAA Registered sites are not likely to have their exact extent correctly identified, and are unlikely to be able to be identified by the grantee party because they may have a non-descript appearance, despite their significance to the native title party. Again, however, there is no evidence of any DAA Registered sites, or sites of particular significance, on the proposed licences in this matter, and no evidence of how interference with sites outside of the proposed licences would affect the area within the proposed licences. A 10 kilometre radius is a significant distance, and there is no evidence that the activities of the grantee party, even allowing that they exercise the full suite of rights available to them under the *Mining Act*, would reverberate so far as to cause disturbance to those sites. Nor is there evidence that the grantee party activities would cause disturbance to any sites or areas of particular significance on E63/1380 or E63/1381, where the expedited procedure was found not to apply in previous Tribunal decisions (as outlined at [25] of this decision).

[44] The native title party contentions also appear to indicate there are other reasons why the expedited procedure should not apply, which are reasons not linked with the sites in the surrounding areas. These are noted above at [30], and include the presence of sacred ceremonial sites and water sources, the presence of Ngadju remains, and camp grounds which are 'imbued with the spiritual presence of Ngadju ancestors'. The separation of this evidence from the evidence in relation to the sites in the surrounding tenement areas (at 3.20 of the native title party's contentions) suggests this other evidence may relate to the proposed licences specifically. If this is the case, there is insufficient evidence contained in the contentions to substantiate the particular significance of these sites. In addition, contentions on their own would be unlikely to sustain a finding of particular significance of a site or area.

[45] The native title party have also mounted an argument that the area of the proposed licences is 'site rich'. They ask me to consider the evidence and findings from the previous Tribunal decisions WO10/1154 (specifically they refer to [19]-[22] and [29]-[32]) and WO10/1371 (specifically they refer to [22]-[24] and [34]-[37]). These paragraphs refer to and extract the two affidavits provided in this current inquiry, as

well as affidavits of Ms Dorothy Dimer, Mr John Graham, Mr Schulz, and a further affidavit of Mr John Walter Graham. None of those affidavits were provided as part of this inquiry, although I am able to adopt those, as well as the findings in the other paragraphs cited, as per s 146 of the Act.

[46] I do adopt and accept those affidavits, and the findings, as I have been referred to them as part of this inquiry and they are relevant to the extent they are within the general area of the proposed licences. However, the evidence within those affidavits, and the findings within those decisions, do not assist me, as they relate to areas and sites which are not within the proposed licences, as previously outlined in this current decision. Previous decisions of the Tribunal have held that sites or areas of particular significance not located within a proposed licence can be impacted upon by the grant of a proposed licence. However, there must be a clear nexus between the sites or areas and the relevant activities of the grantee party. In the inquiry for these proposed licences, such a nexus has not been made out.

[47] The native title party refer to the possibility that inadvertent interference may occur with sites. In *Parker v Iron Duyfken* (at [43]), Member O'Dea found that the expedited procedure should not apply, going on to say (emphasis added):

> Unless there are the negotiations contemplated by s 31 of the Act, there seems to me to be a real risk of interference with sites, even if *inadvertent*. As previously noted, the proposed licence is largely within the Karijini National Park, a large portion of such licence seemingly affected by a number of registered DIA sites, including the 6 registered sites of Ashburton 06, Mt Windell, Bardulanha, Buddunmurra, Tjurruruna and Mt Bruce Sacred Area, which have been identified. Consultation will need to occur with the native title party to ensure that they are avoided. If this does not occur there is a real risk of interference with them.

[48] In that matter, the grantee party provided no specific evidence of what it intended to do about the protection of sites, but sites of particular significance were established to exist within the relevant tenement. In the evidence relating to the proposed licences in this current matter, it has not been established that there are sites of significance on the proposed licences, or any outside the proposed licences which have a nexus such that grantee party activities within the proposed licences would interfere with them.

[49] In relation to the argument that the proposed licences are 'site rich', I turn to *Lungunan v Geotech International*, for example, where it was concluded that s 237(b) is concerned with identifying sites of particular significance and it is not a necessary

requirement to combine various sites into a general assertion that an area is 'site rich'. The Tribunal has held on a number of occasions that the term 'site rich' is not particularly helpful in expedited procedure objection inquiry matters. The central issue remains whether there are any areas or sites of particular significance likely to be interfered with under s 237(b) by the activities of the grantee party.

[50] As stated above (at [35]), the grantee party has offered to enter into an RSHA with the native title party, and as noted (at [22]) the Government party intend to impose an RSHA condition on the proposed licences. The Government party notes in its contentions (at 23) that RSHA agreements provide, amongst other things, that the grantee party must:

- Notify the native title party about proposed on-ground works (whether ground disturbing or not) and provide detailed information about those works before commencing them;
- Consult with the native title party about surveys of the land in relation to ground disturbing works before carrying out those works;
- Carry out surveys with the participation of the native title party prior to commencing ground-disturbing works in some circumstances; and
- Consult with the native title party before applying for any consent under s 18 of the AHA.

[51] The Government party state the native title party has not provided evidence, nor particularised, how the grant of the proposed licences will affect sites referred to in Mr Graham and Mr Dimer's affidavits which exist within, or are in the vicinity of, the area of the proposed licences (at 26). For the reasons I have provided, I agree with the Government party's submission.

[52] I also note the Government party's submission that, in the event there are any areas or sites of particular significance in the area of the proposed licences, interference with those sites is not likely for the following reasons (at 44):

- There is no evidence before the Tribunal that the sites referred to in the native title party's contentions and in Mr Graham and Mr Dimer's affidavits extend into the area of the proposed licences;

- The grantee party has stated in its contentions that it is aware of its obligations under the AHA;

- The area of the proposed licences has been subject to prior mineral exploration and possibly mining activity, and they are also largely covered by a pastoral lease;

- The AHA and its associated processes are likely to prevent interference with any area or site of particular significance to the native title holders. In particular, any 'Aboriginal site, as defined in s 5 of the AHA, which are within the proposed licences but not on the DAA Register, will be protected by s 17 of the AHA. The grantee party may not contravene s 17 without the consent of the Registrar (under s 16 AHA) or the Minister (s 18 AHA). If the grantee party applied for consent under s 18 of the AHA, the Aboriginal Cultural Materials Committee would need to be satisfied of the adequacy of consultation with any relevant Aboriginal persons, which is likely to include the native title party.

[53] I accept there are sites of particular significance within other tenements in the general vicinity of these proposed licences, and appreciate that their full extent may not necessarily be recorded, either on the DAA Register or elsewhere. However, for the purposes of s 237(b) I have been unable to discern any sites or areas of particular significance within the proposed licences, or which otherwise may be interfered with by relevant activities of the grantee party under the grants of these particular proposed licences. I conclude that the grant of the proposed licences are not likely to interfere with areas or sites of particular significance, in accordance with the traditions of the native title party.

Major disturbance to land and waters - s 237(c)

[54] No party has made specific contentions regarding section 237(c) of the Act. Nonetheless, the Tribunal is required under s 237(c) to make an evaluative judgement

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]).

[55] Based on the evidence and contentions submitted by the parties, I conclude there are no topographical, geological or environmental factors on either of the proposed licences which would lead members of the Australian community to believe that exploration activities would result in any major disturbance to land or waters on the proposed licences. I find the grant of the proposed licences are not likely to involve, or create rights whose exercise is likely to involve, major disturbance to land or waters.

Determination

[56] The determination of the Tribunal is that the grant of exploration licences E63/1623 and E63/1624 to Dunstan Holdings Pty Ltd are acts attracting the expedited procedure.

Helen Shurven
Member
12 August 2014