NATIONAL NATIVE TITLE TRIBUNAL

Ashwin and Others on behalf of the Wutha People v Encounter Resources Ltd and Another
[2014] NNTTA 86 (28 August 2014)

Application No: **WO2013/1123**

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

- and -

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

Raymond William Ashwin, June Rose Ashwin, Geoffrey Alfred Ashwin and Ralph Edward Ashwin on behalf of the Wutha People (WC1999/010) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Encounter Resources Ltd (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 28 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, 31, 32(3), 146, 148(b), 151, 237
Mining Act 1978 (WA) s 66
Aboriginal Heritage Act 1972 (WA)
Acts Interpretation Act 1901 (Cth) s 36(2)
Rights in Water and Irrigation Act 1914 (WA)

Cases:	*Ashwin and Others on behalf of the Wutha People v Breaker Resources NL and Another* [2014] NNTTA 63 (‘*Ashwin v Breaker Resources*’)
	Ashwin and Others on behalf of the Wutha People v Peter Romeo Gianni and Another [2014] NNTTA 23 (‘*Ashwin v Gianni 2*’)
	Balanggarra Aboriginal Corporation Registered Native Title Body Corporate v Bar Resources Pty Ltd [2014] NNTTA 62 (‘*Balanggarra v Bar Resources*’)
	Ben Ward; Clarrie Smith and Ors v Western Australia; Australian United Gold Nl; CRA Exploration Pty Ltd; BHP Exploration Pty Ltd; Asian Mining Nl and Sorna Pty Ltd; Wag 6002 of 1996 Fed [1996] FCA 1452 (‘*Ward v Western Australia’*)
	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*’)
	Tullock and Others v Western Australia and Another (2011) 257 FLR 320; [2011] NNTTA 22 (‘*Tullock 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 Stephen Catania, Mony De Kerloy Barristers & Solicitors
Representatives of the Government party:	Mr Rod Wahl, State Solicitor’s Office Mr Matthew Smith, Department of Mines and Petroleum
Representative of the grantee party:	Mr Greg Abbot, M & M Walter Consulting

REASONS FOR DETERMINATION

[1] On 17 July 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 E51/1570 ('the proposed licence') to Encounter Resources Ltd ('the grantee party'). The notice includes a statement that the Government party considers the grant attracts the expedited procedure (that is, 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 29 graticular blocks (approximately 88 square kilometres) with a centroid of 26^{o} 58' S, 118^{o} 50' E, located 53 kilometres south-easterly of Meekatharra, in the Shire of 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 various entities, including 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 day advised in the notice was 17 July 2013, with the four month period for objections closing on 17 November 2013. By the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth) the closing date for lodging an objection became 18 November 2013, the next working day.

[5] The proposed licence is overlapped by the Wutha native title claim (WC1999/010, registered from 15 June 1999) at 22.4 per cent and the Yugunga-Nya native title claim (WC1996/046, registered from 12 June 2000) at 100 per cent.

[6] On 7 November 2013, the Wutha native title claimant made an expedited procedure objection application to the Tribunal in relation to the proposed licence. On 15 November 2013, an expedited procedure objection application was made by the Yugunga-Nya native title claimant, however, on 22 July 2014, the Yugunga-Nya representative advised it was withdrawing the objection application, with no agreement reached (Tribunal number WO2013/1182). As such, the Wutha native title claimant is the sole native title party with respect to the proceedings.

Background

[7] A preliminary conference was held on 10 December 2013 and at the following status conference on 30 April 2014 the grantee party requested the matter proceed to an inquiry before the Tribunal. Directions were made on the same day and parties subsequently lodged their submissions: the Government party initial evidence was lodged on 14 May 2014 through the Department of Mines and Petroleum ('DMP'); the native title party submissions on 24 June 2014; the grantee party submissions on 24 June 2014; and the Government party contentions on 4 July 2014. Amongst other things, the grantee party contentions state it supports the Government party's contentions.

[8] On 24 July 2014, in accordance with standard practice, Tribunal staff emailed the parties requesting they indicate whether they had made all submissions and wished to proceed to an inquiry on the papers without a further hearing. Parties were requested to reply by close of business on 25 July 2014 and advised that no reply would be taken as acceptance. The Government and native title party confirmed via email that they agreed the matter could proceed to be heard on the papers.

[9] The native title party's statement of contentions appears to be based on a pro forma document submitted in previous expedited procedure inquiries, 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 made by the Tribunal involving the native title party. It appears that the native title party has developed a standard practice of stating in their contentions that they will provide oral evidence and then providing no further material, even when given the express opportunity to do so (see *Ashwin v Gianni 1*, *Ashwin v Doray Minerals Limited*, *Ashwin v Gianni 2*, *Ashwin v Cliffs Asia Pacific*).

[10] Taking into account the principles outlined at [11]-[13] by Member O'Dea in *Ashwin v Doray Minerals Limited*, I have decided to proceed with this matter on the papers. There was no support from the native title party that the issues cannot be adequately determined in the absence of the parties (as per s 151 of the Act).

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 QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (at [15]-[21]).

No evidence from the native title party

[13] As stated above, the native title party's contentions appear to be based on a pro forma document submitted in previous expedited procedure matters before the Tribunal and are outlined in full in *Ashwin v Gianni 2* (at [26]-[32]). As with previous matters, the native title party has not provided any evidence in support of its contentions. I refer to my decision in *Ashwin v Gianni 2* where the native title party contentions are largely identical to this matter (at [26]-[32]), and adopt those paragraphs for the purpose of this matter rather than re-stating those identical contentions.

[14] With regard to the requirement for parties to produce evidence in expedited procedure matters and how the Tribunal should approach evidence, the Tribunal has been informed by the principles outlined in *Ward v Western Australia*, where Carr J noted (at [26]):

> The "common sense approach to evidence" is not the same as applying an evidential onus of proof. In administrative matters such as these, any party (not just the native title party) has what might be termed an evidentiary choice. They might choose not to lead any evidence on a particular issue. But that does not necessarily mean that they must fail on that issue i.e. that they have an evidential onus of proof.... However, as Woodward J observed ... where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn when the administrative tribunal applies its common sense approach to evidence. Again, if this happens, it will not be because of the application of any evidential onus of proof, but by the

> application of the common sense approach to evidence. (Citing *McDonald v. Director-General of Social Security* [1984] FCA 57)

[15] In other words, the Tribunal may satisfy itself by its own inquiries on a particular issue (but is not obliged to) or the issue may be resolved by evidence, or cross-examination of the opposing party. It also follows that if the facts of a particular issue are peculiarly within the knowledge of a party and no evidence is tendered by that party, an adverse inference may be drawn by the Tribunal.

Government party evidence in relation to the proposed act

[16] The Government party evidence includes the usual documentation it supplies for all expedited procedure matters which proceed to an inquiry before the Tribunal (see for example *Ashwin v Breaker Resources* (at 18)). I have considered all of the documentation and outline below the evidence most relevant to this matter.

[17] The Tengraph quick appraisal submitted by the Government party details the land tenure, current and historical mining tenements, native title areas, and relevant services and other features within the proposed licence. Notable underlying tenure is:

- Pastoral Lease 3114/584 (Hillview) overlapping at 69.7 per cent;
- Pastoral Lease 3114/898 (Yarrabubba) overlapping at 22.4 per cent;
- Pastoral Lease 3114/820 (Murchison Downs) overlapping at 7.6 per cent;
- Common Reserve 12300 Vermin Proof Fence managed by the Murchison Regional Vermin Council overlapping at 0.1 per cent.

[18] The Report and plan from the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs ('DAA Database') shows there are no registered sites within the proposed licence.

[19] 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 Western Australia* at [11]-[12]), as well as two standard conditions imposed for licences overlapping pastoral or grazing leases (see *Balanggarra v Bar Resources* at 26) and two further conditions relating to the Vermin

Proof Fence Reserve. Eight draft endorsements (which differ from conditions in that the licensee will not be liable to forfeit the licence if breached) are also noted for the proposed licence, drawing the grantee party's attention to: the *Aboriginal Heritage Act* 1972 and any Regulations thereunder; the *Environmental Protection Act* 1986 and the *Environmental Protection (Clearing of Native Vegetation) Regulations* 2004; the relevant legislation relating to water management resource areas; and various other Department of Water requirements regarding the water within and under the proposed licence.

Considering the Evidence in context of s 237 of the Act

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

[20] As noted at [12], President Webb QC summarises the principles to be considered in relation to s 237 of the Act in *Yindjibarndi Aboriginal Corporation v FMG Pilbara*. Applying those principles, I note there is no evidence of 'community and social activities' of a physical or spiritual nature, relating to the community of the native title party.

[21] I accept the Government party's contention that the native title party has not made out any likely interference with community or social activities. I conclude it is unlikely the grantee party's activities will interfere with the community or social activities of the native title party for the purposes of s 237(a).

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

[22] As noted at [12], President Webb QC summarises the principles to be considered in relation to 237 of the Act in *Yindjibarndi Aboriginal Corporation v FMG Pilbara*. Applying those principles, I note no evidence from the native title party in relation to areas or sites of particular significance, in accordance with their traditions. I also note no evidence that there could be a real chance or risk of interference with any such areas or sites.

[23] I accept the Government party's contention that the native title party has not provided evidence to suggest there are sites or areas of particular significance on the proposed licence. I accept the State's regulatory regime in this matter is likely to be sufficient to protect any such sites which may exist. 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.

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

[24] As noted at [12], President Webb QC summarises the principles to be considered in relation to s 237 of the Act in *Yindjibarndi Aboriginal Corporation v FMG Pilbara*. Applying those principles, there is no evidence of a significant or major direct physical disturbance to the relevant land or waters which may arise from what is likely to be done in relation to the future act or of the effect of the rights created by the future act.

[25] I agree with the Government party that the native title party has not made out any such disturbance. Based on the available evidence, I conclude there are no topographical, geological or environmental factors which would lead members of the Australian community to believe that the exploration activities associated with this future act would result in a real risk of major disturbance to land or waters on the proposed licence.

Determination

[26] The determination of the Tribunal is that the act, namely the grant of exploration licence E51/1570 to Encounter Resources Ltd is an act attracting the expedited procedure.

Helen Shurven
Member
28 August 2014