# NATIONAL NATIVE TITLE TRIBUNAL

***Glen Colburg and Others on behalf of Southern Noongar and Another v Mount Gibson Mining Ltd and Another*** **[2014] NNTTA 115 (5 December 2014)**

**Application Nos:** **WO2013/0525 & WO2013/0528**

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

- and -

**IN THE MATTER of an inquiry into expedited procedure objection applications**

**Glen Colburg and Others on behalf of Southern Noongar (WC1996/109) (first native title party)**

- and –

**Hazel Brown and Others on behalf of Wagyl Kaip (WC1998/070) (second native title party)**

- and –

**The State of Western Australia (Government party)**

- and -

**Mount Gibson Mining Ltd (grantee party)**

**DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE**

**Tribunal:** Helen Shurven, Member
**Place:** Perth
**Date:** 5 December 2014

**Catchwords:** Native title – future act – proposed grant of exploration licence – expedited procedure objection applications – 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, 30(1)(a), 30(1)(b), 31, 32(3), 151(2), 237
*Mining Act 1978* (WA) s 66
*Aboriginal Heritage Act 1972* (WA)

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| **Cases:** | *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’)* |
| | *Little v Western Australia* [2001] FCA 1706 (‘*Little v Western Australia’)* |
| | *Ned Cheedy and Others on behalf of the Yindjibarndi#1/Western Australia/Cazaly Iron Pty Ltd* [2008] NNTTA 39 (‘*Cheedy v Cazaly Iron’)* |
| | *Smith v Western Australia & Anor* [2001] FCA 19; (2001) 108 FCR 442 (‘*Smith v Western Australia’*) |
| | *Wilma Freddie and Others/Western Australia/Asia Investment Corporation Pty Ltd* [2004] NNTTA 30 (‘*Freddie v Asia Investment’)* |
| | *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 Peter Nettleton, South West Aboriginal Land & Sea Council |
| **Representatives of the Government party:** | Ms Shelley Moore, State Solicitor’s Office<br>Ms Bethany Conway, Department of Mines and Petroleum |
| **Representative of the Grantee party:** | Ms April French, Austwide Mining Title Management Pty Ltd |

**REASONS FOR DETERMINATION**

[1] On 16 January 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 licence E70/4424-I ('the proposed licence') to Mount Gibson Mining 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 s 29 notice describes the proposed licence as comprising 20 graticular blocks (approximately 56.6 square kilometres) with a centroid of 34$^{o}$ 30' S, 118$^{o}$ 46' E, located 64 kilometres south of Jerramungup, in the City of Albany.

[3] The proposed licence is wholly overlapped by both the Southern Noongar native title determination application (WC1996/109 – registered from 18 November 1996) and the Wagyl Kaip native title determination application (WC1998/070 – registered from 29 September 1998).

[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 the proposed licence was 16 April 2013, and the four month closing date was 16 May 2013.

[5] On 13 May 2013, expedited procedure objection applications in relation to the proposed licence were lodged with the Tribunal by Glen Colburg and Others on behalf of Southern Noongar ('the first native title party') (WO2013/0525) and Hazel Brown and Others on behalf of Wagyl Kaip ('the second native title party') (WO2013/0528). They were accepted by the Tribunal pursuant to s 77 of the Act on 7 June 2013.

[6] On 25 June 2013, a preliminary conference was held at which parties indicated intent to negotiate an agreement. Following a number of status conferences where parties

continued to negotiate, parties were advised at an adjourned status conference on 16 April 2014 that direction dates would be set due to the age of the matters.

[7] On 16 April 2014, I set directions for the inquiry. Pursuant to these directions, the Government party initial evidence was provided on 7 May 2014 through the Department of Mines and Petroleum ('DMP'), and the native title party submissions were filed on 3 June 2014. Following an amendment to directions on 16 June 2014, the grantee party provided submissions on 2 July 2014 and the State Solicitor's Office provided the Government party's submissions on 2 July 2014.

[8] On 1 August 2014, the Tribunal wrote to all parties via email to confirm whether they intended to make any further submissions. All parties 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'.

[9] A map prepared by the Tribunal's Geospatial services was circulated to parties on 3 October 2014, and no party objected to the Tribunal using the map in the course of this inquiry.

## Legal principles

[10] 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.

[11] 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**

[12] The Government party provided the following documents in relation to the proposed licence:

- 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.

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

- Private Lands overlapping 67.5 per cent;
- Road reserves overlapping at less than 0.1 per cent;
- Proposed conservation park (PCP/2) overlapping at 23 per cent
- Proposed nature reserve (PNR/20) overlapping at 5 per cent;
- Reserve for the purpose of government requirements (CR 31240) overlapping at 23 per cent;
- Reserve for the purpose of parklands and recreation (CR 33257) overlapping at 5 per cent;
- Reserve for the purpose of landscape protection (CR 43087) overlapping at 3.3 per cent; and
- Declared rare fauna overlapping at 0.3 per cent.

[14] The quick appraisal establishes that the proposed licence has previously been subject to four surrendered exploration licences, held between 1992 and 2012, overlapping the proposed licence between 0.4 per cent and 100 per cent.

[15] The quick appraisal records the following services affected in relation to the proposed licence:

- Cheyne Bay (WAMIN) – unspecified/unknown (undeveloped) prospect
- 7 major roads
- 26 minor roads
- 37 tracks
- 7 symbolized buildings
- 4 buildings to scale
- 4 minor manmade features
- 11 fence lines
- 2 symbolized yards
- 2 yards to scale
- 5 tanks
- 2 windmills
- 14 symbolized earth dams
- 45 earth dam/turkey nest dams
- 8 cliff/breakaway/rockridge
- 2 non-perennial lakes
- 38 minor watercourses (non-perennial); and
- 74 channel/drains

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

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

[18] 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 conditions imposed in relation to the area overlapped by reserves and also in relation to native vegetation. These conditions 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 prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Landscape Protection Reserve 43087, Government Requirements Reserve 31240, and Parklands & Recreation Reserve 33257.
6. In areas of native vegetation within the tenement, no exploration activities commencing until the licensee provides a plan of management to prevent the spread of dieback disease (Phytophthera sp) to the Executive Director, Environment Division, DMP for assessment and until his written approval has been received. All exploration activities shall then comply with the commitments made in the management plan.

[19] 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:
    - Waterways Conservation Act, 1976
    - Rights in Water and Irrigation Act, 1914
    - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
    - Country Areas Water Supply Act, 1947
    - Water Agencies (Powers) Act 1984
    - Water Resources Legislation Amendment Act 2007

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

5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the 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.

8. 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.

9. The land the subject of this Licence affects a Rare Flora site/s (including Rare Flora Site/s DRF17457, 18605 and 28278) declared under the Wildlife Conservation Act 1950. The Licensee is advised to contact the Department of Environment and Conservation for information on the management of Declared Rare Flora (or Priority Listed Flora) present within the tenement area.

[20] The Government party contentions (at 17) indicate it intends to impose a condition on the 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:

> In respect of the area covered by the licence, the Licensee, if so requested in writing by Southern Noongar, the applicants in Federal Court application no. WAD 6134 of 1998 (WC1996/109) and/or Wagyl Kaip, the applicants in Federal Court application no. WAD 6286 of 1998 (WC1998/070), 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 Southern Noongar and/or Wagyl Kaip the Regional Standard Heritage Agreement endorsed by peak industry groups and the South West Aboriginal Land and Sea Council.

## Native title party submissions

[21] A statement of contentions was submitted on behalf of the Wagyl Kaip native title party and has been adopted by the Southern Noongar native title party for the purpose of this inquiry. The submissions include a statement of contentions, and a number of attachments (as listed at Appendix A of this decision).

[22] The native title party submissions and attachments focus on the negotiations which took place between the parties and do not specifically address the s 237 criteria. The

statement of contentions includes a chronology of negotiations between parties and some general submissions in relation to the negotiation behaviour of parties. The contentions point to statements made in the objection application in relation to why the proposed act should not attract the expedited procedure. Paragraph 7 of the objection application contains a statement as to why the objectors believe that the proposed act is not an act attracting the expedited procedure; the statement is the same for both native title parties.

[23] In relation to s 237(a), the native title parties objection applications state:

- exploration operations will result in permanent damage to plants (including bush tucker and medicine), animal life and sacred sites in the area;
- exploration activities including drilling, bulldozing and costeaning will significantly impact on community conduct and enjoyment of these activities and spiritual connection with the land;
- customary law and beliefs dictates that people who are not traditional owners must seek permission to enter the proposed licence area, and it is difficult for the elders to grant this without adequate consultation and information from the grantee party.

[24] The objection applications state the following in relation to s 237(b):

- the proposed licence area is rich with sites including graves, ceremonial, camping, meeting and other sites which record the historic activities and movements of the objectors' ancestors;
- the exploration activities and driving across the country is likely to destroy these sites unless they are properly identified, recorded and protected;
- the sites can only be visited and identified by the traditional owners.

[25] In relation to s 237(c), the objection applications state:

- the grant of the proposed licence will create rights including the right to drill holes and excavate 1000 tonnes of material which will involve major disturbance to the land;

- the grantee party has not indicated the actual activities it plans to conduct on the proposed licence and the native title party hold particular concerns in relation to radioactive material;
- the granted rights include allow the clearing of established bush and vegetation which may result in scarring the land and weed colonisation;
- the grantee party activities can also include taking and diverting water. Water quality may be impacted by the clearing of vegetation resulting in increased salinity.

**Grantee party submissions**

[26] The grantee party submitted a statement of contentions and the following attachments:

MGI-1: Email dated 26 November 2013, from April French, Austwide Mining Title Management to Peter Nettleton, SWALSC

MGI-2: Email dated 14 May 2014, from Peter Nettleton, SWALSC to April French, Austwide Mining Title Management

[27] The grantee party submissions provide an outline of negotiations that took place and directly address a number of issues raised by the native title party submissions in relation to the negotiations. The grantee party notes that submissions were only provided in relation to the Wagyl Kaip native title party although, as noted above, these submissions are intended to apply to both native title parties.

[28] The grantee party asserts that it undertakes to comply with all relevant legislation and that its standard operating practice is to engage with native title parties to commission heritage surveys under the terms of a heritage protection agreement. The grantee party states it understands the proposed licence area is culturally important and that there may be sites or areas of important to the native title parties which may not be registered under the *Aboriginal Heritage Act 1972.*

[29] The grantee party contentions also draw attention to the failure of the native title parties to provide any historical, anthropological, archaeological, genealogical,

linguistic or environmental evidence as referred to in the objection applications, either by way of affidavit or oral submissions.

[30] The grantee party provides a brief outline of proposed exploration activity to be undertaken on the proposed licence, including:

- Collection of previous exploration and geological/geophysical data
- Ground magnetics surveys
- Mapping and rock chip/soil sampling
- Botany/heritage surveys (if required)
- RC drilling and downhole geophysical surveys if any magnetite targets uncovered

[31] In relation to s 237(a), interference with community or social activities, the grantee party states:

- The statements in the native title parties objections are duplicated and provide no specific information regarding the community and social activities of the respective claim groups which are conducted over the proposed licence (at 36).
- The grantee party relies on the Tribunal's interpretation of s 237(a) that the notion of direct interference requires an evaluative judgement, and the interference must be substantial and not trivial in its impact (*Smith v Western Australia)* (at 37).
- The statements made by the native title parties in relation to the impact of exploration activity on community and social activities, including permanent damage to animal life and sacred sites, are too broad to establish how the proposed exploration will cause direct interference (at 38).
- The grantee party relies on the Tribunals' finding in *Freddie v Asia Investment* that evidence regarding community or social activities which is general and unspecified will not support a finding of direct interference (at 39).
- The grantee party has demonstrated sufficient consultation with the native title parties including: requesting the native title parties' preferred heritage agreement; reviewing and providing comments in relation to the agreement; requesting a written response from the native title parties; considering the response received

from the native title parties; and providing information regarding the grantee party's proposed exploration activity (at 40).

- The Tribunal should consider the grantee party's intention to enter into a heritage agreement and its undertaking to act in accordance with the regulatory regime (at 41).

[32] In relation to s 237(b), interference with areas and sites of particular significance, the grantee party contentions state:

- The native parties contentions do not reference particular sites of significance but instead describe the area as 'rich with sites of significance', and more than half of the proposed licence is private land where native title has been extinguished (at 42).
- Whilst there are no registered sites located within the proposed licence, the grantee party will act in accordance with the 'Draft Tenement Endorsements and Conditions', with attention drawn to the provisions of the Heritage Act and Regulations thereunder (at 43).
- The grantee party is aware of its obligations under the *Aboriginal Heritage Act* and in particular the sections dealing with Aboriginal sites (at 44).
- The grantee party relies on the Tribunals previous findings in relation to the predictive assessment to be undertaken in relation to s 237(b), including the ability to have regard to the grantee's attitude towards entering into an agreement regarding heritage (at 45).
- The lack of specificity provided by the native title parties in relation to areas or sites of particular significance does not support a finding of any real risk of interference with areas or sites as a result of the grant of the proposed licence (at 46).
- The grantee party details its ongoing consultation and negotiations with the native title parties in relation to heritage concerns (at 47-49).
- The grantee party undertakes, where required, to conduct a heritage survey subject to a Heritage Protection Agreement and before any on-ground exploration is commenced (at 50).

[33] In relation to s 237(c), major disturbance to land and waters, the grantee party contends:

- The native title parties have not provided evidence of any sensitive topographical, geological or environmental factors to show the grant of the proposed licence would cause disturbance to land and waters (at 51).
- The grantee party's proposed exploration activity is not likely to cause significant or major disturbance to land and waters (at 52).
- The grantee party undertakes to comply with the relevant statutes, protocols, codes of practice, conditions and endorsements, and other directions and requirements imposed by the Government and any other relevant authorities (at 53-54).
- The Draft Tenement Endorsements and Conditions, along with the regulatory regime, will be sufficient to ensure the grant of the proposed licence will not cause major disturbance to land and waters (at 54).
- Employees and contractors engaged by the grantee party will be instructed to comply with any environmental conditions, practices and to rehabilitate any disturbance to land and waters (at 55).
- Condition 5 of the Draft Tenement Endorsements and Conditions will ensure exploration activities are not undertaken on Landscape Protections Reserve 43087, Government Requirements Reserve 31240 and Parklands and Recreation Reserve 33257 without prior written consent of the responsible Minister (at 56).

**Government party submissions**

[34] As outlined above, the native title parties submitted a statement of contentions in relation to the Wagyl Kaip native title party and adopted the contents in relation to the Southern Noongar native title party. In response, the Government party statement of contentions was submitted in relation to the Wagyl Kaip matter.

[35] The government party contends, among other things, that: the rights which will be conferred by the proposed licence (if granted) are set out in section 66 of the *Mining*

*Act* (and include an extract); the exploration licence is for an initial term of 5 years and is renewable (at 12-13).

[36] The Government party states it proposes to impose the endorsements and conditions set out in the Draft Tenement Endorsement and Conditions Extract (at 16) (and as noted above in [18]-[19] of this decision). The Government party indicated it will also place a further condition on the grant requiring the grantee party to execute a RSHA with the Southern Noongar native title party and/or the Wagyl Kaip native title party if so requested within 90 days of the grant of the proposed licences (at 17). The Government party sets out the general terms of heritage agreements in respect of notifying and consulting with the native title party in relation to proposed works (at 18-19).

[37] The Government party draws attention to the willingness of the grantee party to enter into an alternative heritage agreement, and attaches a statutory declaration of the grantee party representative deposing to this fact (at 20). 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 21).

[38] The Government party asserts that in the absence of any evidence from the native title parties, there is no basis for the Tribunal to accept the assertion that the grant of the proposed licence does not fall within the terms of s 237 of the Act (at 24-29).

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

- The Government party submits there is no evidence to support the native title party's assertions that the grant of the proposed licence will directly interfere with the carrying on of community and social activities (at 44), and in the absence of any such evidence, the Government party contends there is not likely to be direction interference (at 46).
- The grantee party's willingness to enter into a heritage agreement with the native title party is a relevant consideration in determining whether there is likely to be interference with the native title parties' community and social activities. The

native title parties' also have an opportunity to invoke the RSHA condition imposed by the Government party (at 45).

- The proposed licence is almost entirely overlapped by private land, with only 4.4 per cent being unallocated crown land. Some of the interests covering the area of the proposed licence are likely to have extinguished native title and in any case the activities of the native title parties have been subject to, or co-existent with these interests, which the Tribunal is able to take into account (as per *Tullock v Bushwin*) (at 47).
- Hunting and mineral exploration are, by their nature, inherently capable of coexistence and the Tribunal has, on numerous occasions, found that to be the case and determined that the grant of an exploration licence is not likely to interfere with hunting (at 48).
- Given the limited the rights granted by an exploration licence, there is little prospect of substantial interference to the native title party's ability to access or travel across the area of the proposed licences. The risk of the grantee party physically being in the way of the native title parties' is not sufficient to constitute interference (see *Smith v Western Australia* and *Little v Western Australia)* (at 49).
- In the absence of evidence from the grantee party, the Tribunal may assume the grantee party will exercise in full the rights granted by the proposed exploration licence (at 50). I do note however that the grantee party has provided a statement of contentions in this matter, including a brief description of proposed exploration activities to be undertaken on the proposed licence.

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

[39] The Government party highlights that the native title parties have not produced any evidence regarding sites or areas of particular significance (at 58) or 'the manner in which they might be interfered with by the grantee party's activities' (at 59). It contends the Tribunal can have regard to the attitude of the grantee party in relation to entering into a RSHA and 'other evidence of the grantee party directed toward Aboriginal heritage' (at 57).

[40] The Government party contentions state that the assertion the proposed licence area is 'site rich' is of no forensic value to the Tribunal (at 60), and disputes the native title parties' contention that the action of the grantee party driving across country is likely to destroy sites in the area (at 61). In relation to driving on, and accessing the proposed licence, I do note there are already 7 major roads, 26 minor roads and 37 tracks existing on the area.

[41] The Government party also states (at 62) that in the event that any sites or areas of particular significance are identified in the proposed licence area, interference is not likely because:

- there is no evidence that the sites mentioned in the native title parties' objection applications extend in the proposed licence area; and
- the grantee party is willing to work with the native title parties' to avoid interference with any sites, and the native title parties' have the option of enforcing the RSHA condition the Government proposes to impose on the grant of the proposed licence.

*Government party's contentions in relation to s 237(c)*

[42] The Government party notes the native title parties' have not provided any relevant evidence to support the assertion that the grant of the proposed licence is likely to cause major disturbance to land or waters (at 67). The Government party disputes the native title parties' assertion that in the absence of evidence from the grantee party, it can be assumed that the act is likely to involve major disturbance (at 69).

[43] The Government party asserts the grant of the proposed licence is not likely to involve major disturbance to land and waters because:

- the State's regulatory regimes with respect to mining, Aboriginal heritage and the environment will likely avoid any such major disturbance (at 70(1));
- any authorised disturbance caused by the grantee party may be mitigated pursuant to proposed rehabilitation endorsements and conditions to be imposed on the grantee by the Government party (at 70(2)); and

- the area of the proposed licence is largely covered by private land and the proposed activities of the grantee party will be the same as, or no more significant, than the previous and current use of the proposed licence area (at 70(3)).

[44] The Government party also dispute what they believe to be the native title parties' implication that the native title parties' have the right or ability to control or be consulted regarding access to the proposed licence (at 71-72). The Government party asserts the native title parties are inviting the Tribunal to find the expedited procedure does not apply because the act will not be done with the permission of the native title parties', and note that this is not the correct test to be applied (see *Cheedy v Cazaly Iron*) (at 76-77).

## Considering the Evidence

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

[45] 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]).

[46] I accept the Government and grantee party's arguments that the native title parties have not made out any specific community or social activities which occur on this proposed licence, in terms of providing information about what activities are undertaken, where they are undertaken on the proposed licence, why they are undertaken in those areas, and the connection of those activities to the native title party rights and interests. Accordingly, there is also little information connecting the contentions about likely interference with specific community or social activities. I also note the grantee party's outline of proposed activities and its willingness to avoid interference with any social and community activities of the native title parties. As

such, I conclude it is unlikely that the grantee party's activities will interfere with community or social activities of the native title party for the purposes of s 237(a) of the Act.

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

[47] 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.

[48] I accept the Government party's argument that the native title parties have not provided evidence to suggest there are sites or areas of particular significance on the proposed licence. I note the native title parties do provides a list of general sites found in the proposed licence area but not provide any evidence in relation to their exact location or their particular significance to the native title parties'. I accept the State's regulatory regime in this matter is sufficient to protect such sites given: the percentage of overlapping private land; the level of previous activity over the area; the grantee party's contentions and willingness to enter into an RSHA type agreement with the native title parties; and the RSHA condition to be imposed on the grant of the proposed licence. 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.

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

[49] 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* at [41]-[57]).

[50] I agree with the Government party that the native title parties have not made out any particular features or aspects on the proposed licences in this matter, and I conclude there are no topographical, geological or environmental factors which would lead

members of the Australian community to believe that exploration activities would result in a real risk of major disturbance to land or waters on the proposed licences, based on the available evidence.

[51] In conclusion, I find that the proposed licence is not likely to involve, or create rights whose exercise is likely to involve, major disturbance to the land and waters concerned for the purposes of s 237(c) of the Act.

## Determination

[52] The determination of the Tribunal is that the grant of exploration licence E70/4424-I to Mount Gibson Mining Ltd is an act attracting the expedited procedure.

**Helen Shurven**
**Member**
**5 December 2014**

**APPENDIX A: Attachments to native title party contentions**

NTP-A: Email dated 3 December 2012, from April French, Austwide Mining Title Management to Peter Nettleton, SWALSC

NTP-B: Letter dated 6 December 2012 and Heritage Protection Agreement, from Peter Nettleton, SWALSC to April French, Austwide Mining Title Management

NTP-C: Email dated 12 March 2013, from April French, Austwide Mining Title Management to Sharon Avis, SWALSC

NTP-D: Email dated 27 June 2013, from Peter Nettleton, SWALSC to April French, Austwide Mining Title Management

NTP-E: Email dated 19 July 2013, from April French, Austwide Mining Title Management to Peter Nettleton, SWALSC

NTP-F Email dated 19 July 2013, from Peter Nettleton, SWALSC to April French, Austwide Mining Title Management

NTP-G: Email dated 29 October 2013, from April French, Austwide Mining Title Management to Peter Nettleton, SWALSC

NTP-H: Email dated 26 November 2013, from April French, Austwide Mining Title Management to Peter Nettleton, SWALSC

NTP-I: Email dated 26 November 2013, from Peter Nettleton, SWALSC to April French, Austwide Mining Title Management

NTP-J: Email dated 27 November 2013, from April French, Austwide Mining Title Management to Peter Nettleton, SWALSC

NTP-K: Email dated 14 May 2014, from Peter Nettleton, SWALSC to April French, Austwide Mining Title Management

NTP-L: Email dated 20 May 2014, from April French, Austwide Mining Title Management to Peter Nettleton, SWALSC