NATIONAL NATIVE TITLE TRIBUNAL

Scotty Birrell & Ors on behalf of Koongie-Elvire v State Resources Pty Ltd **[2014] NNTTA 116 (16 December 2014)**

Application No: **WO2013/0937**

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

- and -

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

Scotty Birrell & Ors on behalf of Koongie-Elvire (WC1999/040) (native title party)

- and -

The State of Western Australia (Government party)

- and -

State Resources Pty Ltd (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 16 December 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 cause major disturbance to land or waters – expedited procedure attracted

Legislation: *Native title Act 1993* (Cth), ss 29, 30(1), 31, 146, 151(2), 237

Mining Act 1978 (WA)

Aboriginal Heritage Act 1972 (WA)

Cases:

FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation RNTBC [2014] FCA 1335 (*'FMG Pilbara v Yindjibarndi Aboriginal Corporation*')

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

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

Oriole Resources Ltd/State of Western Australia /Albert Little and Ors on behalf of Badimia [2004] NNTTA 37 (‘*Little v Oriole Resources*’)

Silver v Northern Territory (2002) 169 FLR 1*;* [2002] NNTTA 18 *(‘Silver v Northern Territory’*)

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

Tullock v Western Australia (2011) 257 FLR 320; [2011] NNTTA 22 (‘*Tullock 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*')

Representative of the native title party:	Ms Angela Booth, Kimberley Land Council
Representatives of the Government party:	Mr Luke Villiers, State Solicitor’s Office Ms Bethany Conway, Department of Mines and Petroleum
Representative of the grantee party:	Mr Matthew Clohessy, Emerald Tenement Services

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 E80/4553 ('the proposed licence') to State Resources Pty Ltd ('the grantee party'). The notice included a statement that the Government party considers the grant attracts the expedited procedure (that is, that the proposed licence is an act that can be done without the negotiations required by s 31 of the Act).

[2] The proposed licence comprises 17 graticular blocks (approximately 116.9 square kilometres) situated 11 kilometres south of Halls Creek in the Shire of Halls Creek. The proposed licence is overlapped by the registered native title claim of Koongie-Elvire (WC1999/040 - registered from 15 November 1999) at 68.2 per cent. On 28 August 2013, Scotty Birrell and others on behalf of the Koongie–Elvire Native Title Claimants ('the native title party') lodged an expedited procedure objection application with the National Native Title Tribunal ('Tribunal') in respect of the proposed licence (designated by the Tribunal as matter number WO2013/0937). The proposed licence is also overlapped by the registered native title claim of the Ngarrawanji (WC1996/075 – registered from 25 June 1996) by 4.3 per cent. The Ngarrawanji claimants also lodged an expedited procedure objection, however, this objection was withdrawn on 20 June 2014. As such, the Koongie-Elvire are the native title party for the purposes of this matter.

[3] On 24 October 2013, I was appointed as the Member for the purposes of conducting any inquiry into the objection application. In accordance with standard practice, the Tribunal gave directions for the parties to provide contentions and evidence for an inquiry to determine whether or not the expedited procedure is attracted. These directions allow a period after the s 29 closing date for the lodgement of objections for parties to discuss the possibility of reaching an agreement which could lead to disposal of the objection by consent.

[4] Agreement could not be reached and pursuant to the inquiry directions, the Department of Mines and Petroleum ('DMP') provided evidence to the Tribunal and other parties on behalf of the Government party on 14 May 2014. The native title party provided a

statement of contentions and evidence on 11 June 2014 ('Native Title Party Contentions') including:

- an affidavit from Mr Harold Cox, declared on 7 August 2014;
- an unsworn affidavit from Mr Kenny Boomer (with a subsequent copy, which had been sworn on 18 November 2014, being provided to all parties and the Tribunal on 21 November 2014), and;
- an affidavit from Ms Barbra Friedewald, declared on 12 August 2014.

I accept that Mr Boomer and Mr Cox have the authority to speak for the area of the proposed licence, and note that Ms Friedewald is a legal officer for the native title party.

[5] The grantee party provided a statement of contentions on 6 August 2014 ('GP contentions'). The Government party provided a statement of contentions on 9 July 2014 ('SSO contentions'). On 12 August 2014, the native title party representative sought to replace their 11 June contentions following further investigation on their client's behalf. No party objected to this course of action and the native title party lodged its fresh contentions and evidence on 12 August 2014. On 26 August 2014, the Government party sought an extension of three days in order to respond to the new contentions of the native title party. On 29 August 2014, the Government party replied to the native title party's contentions. Having considered the material before me, I am satisfied that the objection can be adequately determined 'on the papers' in accordance with s 151(2) of the Act (that is, without a formal hearing).

[6] While the original objection application raised each limb of s 237, the native title party has not made any contentions in relation to s 237(c) of the Act. Notwithstanding the fact the native title party has elected not to address this issue, the Tribunal is required to consider whether there is any evidence to support the conclusion that the grant of the proposed licence is likely to interfere with such activities (see *Graham v Dunstan Holdings Pty Ltd* at [8]).

[7] On 28 November 2014, the Tribunal provided parties with a copy of a map produced by the Tribunal's geospatial division to be used for the purposes of this determination, and

no objections were received in response. As the grantable area in this matter is less than that originally notified (as outlined at [14] of this decision), an updated map showing the grantable area was circulated to parties on 9 December 214.

Legal principles

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.

[8] In relation to the legal principles to be applied in this matter, I adopt those outlined by President Raelene Webb QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* at [15]-[21]. These principles have been endorsed by the Federal Court in *FMG Pilbara v Yindjibarndi Aboriginal Corporation*.

Evidence in relation to the proposed act

Evidence provided by the Government party

[9] The Government party has provided: a revised description of the proposed tenement area; information regarding native title claims; current tenure information; sites registered under the *Aboriginal Heritage Act 1972* (WA) ('AHA'); information regarding the grantee party and the proposed tenement; information regarding the conduct of the grantee party and the Auditor General's report; and a response to the contentions and evidence of the native title party. A Tengraph quick appraisal was

provided on 11 June 2014 for the full area of the proposed licence, and an updated version was provided on 9 July 2014 showing only the area available for grant (and this is the area referred to at [14] of this decision). This updated information indicates that the overlap with the native title party claim area and the area available for grant is 32.7 per cent, as opposed to the 68.2 per cent overlap over the whole of the proposed licence.

[10] The Government party makes the following contentions regarding the area of the proposed tenement:

> 17. The proposed tenement area covers approximately 11, 696.44 hectares. Some of that area overlaps with the existing mining tenure shown on the map attached at Annexure 1 with the detail shown under the heading *"Tenements Affected"* on the Tengraph Quick Appraisal Form for the proposed tenement (Annexure 2). The existing mining tenure includes:
>
> a) 3 exploration licences which partly overlap the area (to a maximum of 55.5% in relation to E 80/4555) of the proposed tenement; and
>
> b) 4 prospecting licences which partly overlap the area (to a maximum of 1.5% in relation to P80/1635) of the proposed tenement.
>
> 18. If granted, the portions of the proposed tenement subject to existing mining tenure will be excised from the proposed tenement. Once these areas are removed, the maximum grantable area of the proposed tenement is 5,523.91 hectares. The maximum grantable tenement area is shown on the revised Tengraph Quick Appraisal Form for the proposed tenement (Annexure 3). The Government Party relies on the information provided in the revised Tengraph Quick Appraisal Form for the purposes of these Contentions.

[11] The quick appraisal provided on 9 July shows the underlying tenure of the proposed licence to be: vacant crown land comprising 9.2 per cent; pastoral lease (Indigenous held) (Koongie Park) comprising 6.6 per cent; pastoral lease (Indigenous held) (Elvire Park) comprising 13.5 per cent; pastoral lease 3114/857 (Burks Park) comprising 70.6 per cent; and road reserve (Duncan Highway) comprising <0.1 per cent.

[12] The quick appraisal establishes that the area of the proposed licence has previously been subject to the following mineral tenure:

- 13 exploration licences overlapping by between 0.1 and 53.8 per cent; all forfeited, expired or surrendered between 1984 and 2009;
- 1 gold mining lease overlapping by <0.1 per cent which was forfeited in 1959;
- 4 mining leases overlapping by between <0.1 and 0.5 per cent; forfeited between 1959 and 1989;

- 6 mineral claims overlapping by between 0.2 and 1.9 per cent; all surrendered in 1977; and

- 2 temporary reserves overlapping by 67.5 and 7.4 per cent; both cancelled in 1981.

[13] The Government party reply notes the following regarding native title claims:

> 19. The proposed tenement falls partly within the external boundaries of the Koongie-Elvire native title determination application (32.7%) and the Ngarrawanji native title determination application (WC 96/40; WAD 6107/98) (9.2%). The area of the Koongie-Elvire claim is approximately 1016.09 square kilometres and the area of the Ngarrawanji claim is approximately 4078.66 square kilometres. The claimants in the Ngarrawanji native title determination application withdrew their objection to the inclusion of the statement that the grant of the proposed tenement is an act attracting the expedited procedure on 20 June 2014.

[14] The Government party reply notes the following regarding sites registered under the *Aboriginal Heritage Act 1972* (WA):

> 23. A search of the Department of Indigenous Affairs' Aboriginal Heritage Inquiry System ("AHIS") indicates that 5 sites registered under the *Aboriginal Heritage Act 1972* (WA) ("AHA") fall within the area of the proposed tenement. Those sites are as follows:
>
> a) Old Gully Hills (Mythological); Site ID. 13072;
> b) Rockhole Creek (Artefacts/Scatter, Quarry); Site ID. 13873;
> c) Halls Creek Tributary (Artefacts/Scatter, Quarry); Site ID. 13903;
> d) Windu (Artefacts/Scatter); Site ID. 13907; and
> e) Halls Creek (Artefacts/Scatter); Site ID. 13908.
>
> 24. The AHIS also indicates that 7 'other heritage places' fall within the area of the proposed tenement. Those other heritage places include:
>
> a) 2 mythological sites (Bat Dreaming (Site ID. 13024); Old Gully Pool (Site ID. 13073.));
> b) One camp site (Eschers Cap; Site ID. 13074); and
> c) 4 artefacts/scatter sites (Brockman 3 (Site ID. 13243); Halls Creek (Site ID. 13870, 13871 and 13906)).

The updated Tribunal map indicated that only Rockhole Creek, and two of the four artefact scatter sites (13870 and 13871) are on the overlap between the area available for grant and the native title party claim area.

[15] The quick appraisal provided on 9 July 2014 shows that services affected on the area available for grant are a well/bore, the Duncan Highway, and 3 major watercourses.

[16] Tribunal mapping indicates there are Aboriginal communities located near the area of the proposed licence, including the community of Halls Creek. There are no indications of Aboriginal communities located within the proposed licence.

[17] A draft Tenement Endorsement and Conditions Extract provided on 9 July 2014 for the area available for grant included in the Government party documentation indicates that the grant of the proposed licence will be subject to 12 endorsements and 8 conditions imposed on grant.

[18] The following endorsements (which differ from conditions in that the breach of an endorsement does not make the licencee liable to forfeiture of the licence) are those which will be imposed on grant:

1. The Licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any related 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 [*sic*] attention is drawn to the provisions of the:
   a. Waterways Conservation Act, 1976
   b. Rights in Water and Irrigation Act, 1914
   c. Metropolitan Water Supply, Sewerage and Drainage Act, 1909
   d. Country Areas Water Supply Act, 1947
   e. Water Agencies (Powers) Act 1984
   f. 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 Surface Water (Fitzroy River and Tributaries) and Irrigation District Areas (ID/9 Camballin) the following endorsements apply:

8. The abstraction of groundwater is prohibited unless a current licence to take surface water has been issued by the DoW.

9. All activities to be undertaken with minimal disturbance to riparian vegetation.

10. No [sic] being carried out that may disrupt the natural flow of any waterway unless in accordance with the current licence to take surface water or permit to obstruct or interfere with beds or banks issued by the DoW.

11. Advice shall be sought from the DoW and the relevant service provider if proposing exploration being carried out in an existing or designated future irrigation area, or within 50 metres of an irrigation channel, drain or waterway.

In respect to Proclaimed Ground Water Areas (Canning-Kimberley) the following endorsement applies:

12. 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.

Endorsement 10 appears to have a typographical error - it would appear to be referring to 'Exploration', as per the State's template list of endorsements.

[19] The conditions to be imposed are the standard four conditions imposed on the grant of all exploration licences in Western Australia (see *Tullock v Western Australia* at [11]). The following additional conditions will also be imposed on the proposed licence:

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 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 interference with Geodetic Survey Station Gordon Downs 12 & 13 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

8. No excavation, excepting shafts, approaching closer to the Duncan Highway, Highway verge or the road reserve than a distance equal to twice the depth of the excavation and mining on the Duncan Highway or Highway verge being confined to below a depth of 30 metres from the natural surface, and on any other road or road verge, to below a depth of 15 metres from the natural surface.

However, it appears that Gordon Downs 12 & 13 is in the area not available for grant, when comparing the two quick appraisals provided in this matter, and so condition 7 will not affect the area available for grant.

[20] The Government party gives regard to the evidence provided by the native title party and to the legal principles relating to s 237(a) (at paragraphs 44–78). The Government party accepts that the native title party carries out community activities in the form of

camping, fishing, hunting and gathering bush tucker and gathering traditional medicines and materials for tools in the area of the proposed licence. However, they do not accept that the native title party evidence establishes only one river is regularly used for camping. The Government party contends that the native title party evidence only establishes that the native title party passes on intergenerational knowledge, which is confined to the practice of the primary activities of hunting and gathering bush tucker and traditional medicines.

[21] The Government party contends that the native title party has provided no evidence as to the extent of the burning activity described in Mr Cox's affidavit, which was attached to the native title party's contentions, but that it details only when the activity occurs and for what purpose.

[22] The Government party does not accept that living on the area, visiting or moving around the area or caring for animals on the area of the proposed licence constitute community or social activity for the purposes of s 237(a) of the Act over and above those activities already conducted in the area (for example hunting and camping).

[23] The Government party notes (at paragraph 70) that the proposed licence has been subject to prior mineral exploration and is also extensively covered by a pastoral lease. The Government party contends that there appears to be no Aboriginal communities within the area of the proposed licence and they note the use of the term 'regularly' by the native title party to describe how often they visit the area is vague. They also contend that the activities permitted under the exploration licence are unlikely to have any real disruptive effect upon the asserted community and social activities in the area. They contend that hunting, fishing and mineral exploration are capable of coexistence, and that the native title party contentions do not articulate the manner in which the grant of the proposed licence will interfere with the activities.

[24] The Government party contends (at paragraph 71) that the existence of a number of exploration tenements over the same native title claim area demonstrates that this licence can be granted without interfering directly with the community or social activities of the native title party.

[25] The Government party contends (at paragraphs 87–105) that the AHIS search indicates that there are 5 registered sites and 7 other heritage places situated within the proposed

licence. The Government party contends that the evidence of these sites was not addressed extensively in Mr Cox's Affidavit, as only Old Gully Hills is referred to by Mr Cox. The Government party contends the evidence provided about Old Gully Hills is vague and does not identify the site with certainty, so it is impossible to identify with any specificity its location. The Government party contends that some sites may not fall within the proposed licence area and that the affidavits of Mr Cox and Mr Boomer only very broadly identify sites and do not give enough evidence to support them being sites of particular significance. The Government party contends that the grantee party is aware of the sites and will abide by its legal obligations in respect to sites, and that the AHA processes are likely to prevent interference with any area or site of particular significance. The Government party contends that the native title party gives no authority in support of the statement that the native title party believes the 'Grantee's efforts to engage with the native title party to date is material' and the Government party notes the grantee party's contentions confirm that ground disturbing activity will be minimal in the beginning of the exploration program, as the area will be accessed via existing tracks and early stage works do not require ground disturbance.

[26] The Government party contends that the grant of the proposed licence is not likely to interfere directly with the carrying on of the community or social activities of the native title party, nor is it likely to interfere with areas or sites of particular significance in accordance with their traditions.

Evidence provided by the native title party

Section 237(a) – Community or Social Activities

[27] The native title party's contentions (at paragraph 12-28) address community and social activities. They refer to various activities and state that they engage in these activities all year round and more intensively on the weekend. The native title party contends that many families access the proposed licence area and they use different bush tucker from it. The native title party contends that the activities of camping, teaching, caring for country, and the unique qualities of the area will be affected by the grant of the proposed licence (at paragraphs 19–25).

[28] The affidavit of Mr Harold Cox declares that 'The youngest person who lives at Fly Well is 6 and he goes onto the exploration licence area every day, an explorer's activities which may limit his access or add risk to his freedom will interfere with our community social activities'. He also states that 'now Koongie-Elvire people go out to the exploration licence area to hunt, fish, gather bush tucker and medicine and teach their young people stories'.

Section 237(b) – Sites of particular significance

[29] The native title party contends (at paragraph 29) that the grant of the proposed licence would result in interference with area or sites of particular significance.

[30] The native title party contends that the definition of an area to which the AHA applies (as per s 17) is more restrictive than the terms of s 237 (b) of the Act. It is their view that on the proposed licence there are sites of particular significance under the terms of section 237(b) of the Act which do not fall within the definition of 'site' under the AHA, that would not be protected under the AHA regime. The native title party contends that s 17 of the AHA does not protect the site from interference but rather from a person who 'evacuates, destroys, damages, conceals or...alters any Aboriginal site; or in any way damages, removes, destroys [or] conceals'. They contend that the terms of the AHA do not require the grantee party to consult with the native title party and, therefore, the AHA cannot be relied upon to protect areas or sites of significance from interference.

[31] The native title party notes their view (at paragraphs 37–43) that the protective legislative regime of the AHA is ineffective because it depends on the capacity of the proponent to recognise a site, is weak due to its honour base, and that protection of sites is not guaranteed and interference may occur inadvertently.

[32] The native title party contends (at paragraph 47) that once a significant site has been interfered with, it is changed in perpetuity, and believes there are significant historical places and they have spiritual beings that reside especially in the proposed licence area (at paragraph 49).The native title party contends (at paragraph 49–58) that they believe there are significant historical sites and spiritual beings that reside in the area, that there are registered sites that are 'closed', as well as unregistered sites and also dangerous sites in the area of the proposed licence. I am referred to the affidavits of Mr Cox and

Mr Boomer. In response to this, the grantee party contend that they are willing to enter into a standard regional heritage agreement and they would be agreeable to undertake a heritage survey if required, in order to ensure that Aboriginal sacred sites are not disturbed.

[33] The native title party refers to four closed sites (at paragraph 50) and notes the extracts from the DAA website provided by the Government party which indicate the presence of five registered sites and seven other heritage places within the area. However, I note none of the four closed sites are within the grant area/claim overlap. As noted earlier, of the five registered sites, only one is within the grant area/claim overlap (13873-Rockhole), and two of the other heritage places.

[34] The native title party notes (at paragraph 52) that the grantee party is not aware of the location of 'closed' sites or sites of particular significance which are within the native title party special knowledge. They say it is likely the grantee party activities will interfere with registered sites, despite their intention to avoid interference.

[35] Non registered sites are referred to in the contentions (at paragraph 53 and 54) and I am also referred to the affidavit of Ms Barbra Friedewald and Mr Kenny Boomer which are attached to the contentions.

[36] In relation to dangerous sites (at paragraphs 55–58), I am referred to the affidavits of Mr Harold Cox and Mr Kenny Boomer, where Mr Cox deposes injury will be inflicted on strangers should they interfere/enter particular parts of the proposed licence area. Mr Boomer identifies that the area is the home of good spirits. It is noted that Mr Boomer identifies the significant mountain range on the area as being home to all Jaru spirits.

[37] In relation to interference (at paragraphs 59 and 60) the native title party contends that mere presence may cause interference with a site and in accordance with traditional law and culture, unauthorised persons may not be present at particular sites because of restrictions on access.

[38] The native title party contends (at paragraphs 61 – 64) that the grantee party's efforts to engage are material, and have not been not meaningful. The native title party contends there is a real chance that the future act will directly interfere with sites of significance.

Evidence provided by the Grantee party

[39] The contentions provided on behalf of the grantee party state that it intends to conduct initial exploration over the surface area of the proposed licence, consisting of geological mapping and soil sampling following the grant of the application. The contentions note that access to exploration targets will be via the numerous existing station tracks and the Duncan Highway. The contentions note that all required rehabilitation will be listed in the conditions attached to the licence document and early work programs will not require ground-disturbing activities.

[40] The contentions state that the grantee party is fully aware of the requirements under the AHA, particularly its obligations regarding Aboriginal Sacred Sites and the protection thereof as provided by part 4 of the AHA.

[41] The contentions state that the grantee party has undertaken a search of the proposed licence area via the Department of Aboriginal Affairs and attach a copy of that search. The grantee party is willing to enter a Standard Regional Heritage Agreement and they advise that the agreement provided by the Kimberley Land Council is not acceptable to them. They note that they would be agreeable to undertake a heritage survey if required in order to ensure that Aboriginal sacred sites are not disturbed. The grantee party contends that the expedited procedure should apply for the above reasons, and the reasons outlined in the Government's party's statement of contentions. I do note the Government party have not offered an RSHA condition as part of the suite of conditions in this matter.

Considering the evidence

Community or social activities - s 237(a)

[42] The Tribunal is required to make a predictive assessment of whether the grant of the proposed licence and activities undertaken pursuant to it are likely to interfere with the community or social activities of the native title party (in the sense of there being a real risk of interference) (see *Smith v Western Australia* at [23]). Direct interference involves an evaluative judgment that the future act is likely to be the proximate cause of the interference and must be substantial and not trivial in its impact on community or

social activities (see *Smith v Western Australia* at [23]). The assessment is also contextual, taking account of other factors that may have already had an impact on a native title party's community or social activities (such as mining or pastoral activity) (see *Smith v Western Australia* at [27]).

[43] The Government party contends there is little evidence members of the native title party carry out community or social activities within the proposed licence area, and I agree that the native title party's contentions are, for the most part, general in nature. The native title party states (at paragraph 19-21) that camping, teaching and caring for country occur within and around the proposed licence area and they refer to the affidavit of Mr Cox. The native title party state they access the area every day (at paragraph 17), but they do not state to what extent those activities occur on the proposed licence and refer to adjacent areas being used as opposed to the proposed licence area. The Government party contends that hunting and exploration activities are inherently capable of coexistence, as has been found by the Tribunal on numerous occasions.

[44] The native title party's contentions state that the proposed licence area has main access roads that are used very regularly by members of the native title party. However, they refer to areas that are 'very close' to the proposed licence area and I am not convinced by the available evidence that access to the area of the claim/grantable area overlap, or sites that are 'very close' to that area, will be hindered by the granting of the proposed licence.

[45] As the Tribunal has found in previous determinations, evidence about community or social activities which is of a general and unspecified nature will be insufficient to lead to a finding that the proposed act will directly interfere with those activities in a substantial or more than trivial way (see *Freddie v Asia Investment* at [14]).

[46] The Tribunal has accepted that the intentions of the grantee party in a particular matter are relevant in assessing whether the activities are likely to directly interfere with the carrying on of a native title party's community or social activities, or interfere with areas or sites of particular significance to a native title party. I adopt the findings of the Tribunal in *Silver v Northern Territory* at [29]-[30], which outlined that:

> The adoption of a predictive assessment necessarily allows the Tribunal to receive evidence of a grantee's intention where that evidence is adduced. In the absence of any

> evidence of intention, the Tribunal would be at liberty to assume that a grantee will fully exercise the rights conferred by the tenement...evidence of intention cannot be unilaterally discarded in advance, as it is logically relevant to the question of likelihood.

[47] The grantee party has indicated in its contentions that its initial activities will be limited to geological mapping and soil sampling, and will not require ground-disturbing activities.

[48] To the extent the Tribunal accepts the evidence that demonstrates members of the native title party carry out community and social activities in the proposed licence area, the Government party submits there is not likely to be direct interference because:

- The grantable area of the proposed licence/claim overlap has been subject to prior mineral exploration and possibly mining activity, and it is likely these activities have affected, and continue to affect, the extent to which community and social activities can be carried out in the relevant area (at paragraph 39(a));
- The grantable area of the proposed licence is almost entirely covered by pastoral and historical leases, and the carrying on of the community and social activities of the native title party in their claim area has been subject to, or co-existent with, all of these lawful activities for a significant period of time. Any intersection between the grant of the proposed licence and the current activities of the native title party would be the same as, or no more significant than, the previous and continuing use of the area (at paragraph 39(b));
- There are no Aboriginal communities within the area of the proposed licence;
- 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;
- It is difficult to envisage how mineral exploration activity could cause substantive interference to the ability of the native title party to access the grantable area of the proposed licence.

[49] Although there is no specific evidence of the degree to which the native title party's community or social activities have been interfered with by past exploration and continuing pastoral activity, the Tribunal is entitled, as part of the overall context, to

have regard to the fact that the previous grant of exploration licences, and particularly pastoral leases, will already to some extent have interfered with the native title party's community and social activities (see *Tullock v Bushwin Pty Ltd* at [122]). I believe it can be inferred from the existence of previous exploration tenure that the holders of those licences exercised, to some extent, the rights set out in s 66 of the *Mining Act* in the area of the proposed licence. While there is no particular evidence from any party in relation to how this affects the area proposed to be granted over the native title claim area, I accept the Government party's contention that these activities may have already affected, and may continue to affect, the extent to which the native title party's community and social activities can be carried out in the proposed licence area. I also accept the Government party's contentions regarding the effect of the pastoral leases.

[50] In the circumstances, taking into account the evidence available, I am unable to conclude there is a real chance or risk there will be direct interference of the kind contemplated by s 237(a) of the Act in this matter.

Sites of particular significance - s 237(b)

[51] The issue the Tribunal is required to determine in relation to s 237(b) of the Act is whether there is likely to be (in the sense of a real risk of) interference with areas or sites of particular (that is, more than ordinary) significance to the native title party in accordance with their traditions. As noted, it is established in DAA documentation that there are five sites registered under the AHA which fall within the area of the proposed licence. There are also seven 'other heritage' places that fall within the area of the proposed licence. However, as noted earlier in this decision, not all of these fall within the grantable area/native title party claim area overlap. In addition, the grantee party contends that they are aware of these. The Register does not purport to be a record of all Aboriginal sites in Western Australia, and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters.

[52] The Government party reply states that, although there are registered sites within the proposed licence, the native title party does not sufficiently address these sites in its contentions. The Government party rejects the native title party's contention that mere

presence in an area, or lack of consultation before entering an area, can constitute direct interference for the purposes of s 237(b).

[53] The affidavit of Mr Kenny Boomer declares that there are places in the proposed licence that are important to the Jaru people. I note that he refers to the Jaru people and not the Koongie-Elvire people. Mr Boomer states that members of the Koongie-Elvire Applicant asked him to give evidence and that the Jaru and Koongie-Elvire people have a very close relationship. Mr Boomer states that the Koongie-Elvire claims overlap part of the traditional Jaru lands, which I take to mean he knows about significant areas or sites in the proposed licence. He states that all of Jaru dreamtime spirits come from this place [the exploration licence area]. He states that the good spirits have their home within the exploration licence area and that there is a risk that those spirits would leave and stop looking after their people if an explorer interferes with 'this place', then they would stop looking after traditional owners on country. He states that the explorer should not go into the range which is where the spirits live and come from as there is too much risk that their activities might change the story. I note that it is not clear where the range extends on proposed licence, or, more specifically, within the proposed licence/grantable area overlap.

[54] The Affidavit of Mr Harold Cox states that he knows of a special rock in the area, a significant place called Nowlu and places where spirits are. He does not, however, state how these places may or may not be affected by the grant of the proposed licence. Again, it is difficult to know whether this site falls within the grantable area/claim area overlap.

[55] The Government party contends that, in the event there are any areas or sites of particular significance in the proposed licence, interference is not likely because:

- The area has been subject to previous exploration and possibly mining activity; and
- The AHA and associated processes are likely to prevent such interference.

[56] Based on the available evidence, I cannot conclude there are any sites of particular significance on the grantable area/claim area overlap. As such, I further conclude there

is no real chance or risk of interference with areas or sites of particular significance as a result of the grant of the proposed licence, in the context of s 237(b).

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

[57] As noted above at [7], the native title party has not made any specific contentions on the issue of major disturbance. Nonetheless, the Tribunal is required under s 237(c) 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, taking into account the concerns of the native title party (see *Little v Oriole Resources* at [41]-[57]).

[58] No specific evidence has been provided regarding any special topographical, geological or environmental factors that might exist in relation to the proposed licence. The activities of the grantee party will be subject to the various regulatory regimes that exist in relation to mining, environmental protection and Aboriginal heritage, as well as the specific conditions and endorsements outlined at [19] and [20], which include the requirement to rehabilitate any disturbances made to the surface of the land. There is no evidence to suggest the grantee party will not comply with these regimes or the conditions imposed.

[59] 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.

Determination

[60] The determination of the Tribunal is that the act, namely the grant of exploration licence E80/4553 to State Resources Pty Ltd, is an act attracting the expedited procedure.

Helen Shurven
Member
16 December 2014