# NATIONAL NATIVE TITLE TRIBUNAL

***Balanggarra Aboriginal Corporation Registered Native Title Body Corporate v Valperlon Bulk Commodities Pty Ltd and Another*** **[2014] NNTTA 113 (4 December 2014)**

**Application No:** **WO2013/0955**

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

- and -

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

**Balanggarra Aboriginal Corporation Registered Native Title Body Corporate (WCD2013/005) (native title party)**

- and -

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

- and -

**Valperlon Bulk Commodities Pty Ltd (grantee party)**

**DETERMINATION THAT THE ACT IS NOT AN ACT ATTRACTING THE EXPEDITED PROCEDURE**

**Tribunal:** Helen Shurven, Member
**Place:** Perth
**Date:** 4 December 2014

**Catchwords:** Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act is likely to interfere directly with the carrying on of community or social activities – whether act is likely to interfere with sites of particular significance – whether act is likely to involve major disturbance to land or waters – determination area – Aboriginal Reserve – Kalumburu Reserve – determined lands – exclusive native title exists – exclusive possession – expedited procedure is not attracted – expedited procedure does not apply

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

**Cases:** *Balanggarra Aboriginal Corporation Registered Native Title Body Corporate v Bar Resources Pty Ltd* [2014] NNTTA 62 (‘*Balanggarra v Bar Resources*’)

*Barbara Sturt and Others on behalf of the Jaru Native Title Claimants v Baracus Pty Ltd* [2014] NNTTA 32 (‘*Sturt v Baracus*’)

*Bruce Monadee & Ors (Ngarluma Indjibarndi) and Wilfred Hicks (Wong-goo-tt-oo)/Western Australia/Cossack Resources* (2003) 174 FLR 381, [2003] NNTTA 38 (‘*Ngarluma Indjibarndi and Wong-goo-tt-oo v WA*’)

*Cheinmora v Heron Resources* (2005) 196 FLR 250; [2005] NNTTA 99

*Cheinmora v State of Western Australia (No 2)* [2013] FCA 768 (‘*Cheinmora v Western Australia*’)

*Delores Cheinmora & Others on behalf of Balanggarra/Western Australia/Swancove Enterprises Pty Ltd*, [2011] NNTTA 93 (‘*Cheinmora v Swancove Enterprises*’)

*Gooniyandi Aboriginal Corporation Registered Native Title Body Corporate v Western Australia and Another* [2014] NNTTA 89 (‘*Gooniyandi v Western Australia*’)

*HL (Name witheld for cultural Reasons) and Others (Warrwa #2) v 142 East Pty Ltd* [2014] NNTTA 49 (‘*Warrwa #2 v 142 East Pty Ltd*’)

*Hughes v Western Australia* (2003) 182 FLR 362; [2003] NNTTA 69 (‘*Hughes v Western Australia*’)

*John Watson & Ors on behalf of Nyikina Mangala/Western Australia/Brockman Exploration Pty Ltd* [2013] NNTTA 35 (‘*Watson v Brockman Exploration Pty Ltd*’)

*Little v Oriole Resources Pty Ltd* (2005) 146 FLR 576; [2005] FCAFC 243 (‘*Little v Oriole Resources*’)

*Palmer Gordon Ngalpil/Western Australia/Glengarry Mining NL*, [1996] NNTTA 44 (‘*Ngalpil v Glengarry Mining*’)

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

*Smith v Western Australia and Another* (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*’)

*Wanjina-Wunggurr (Native Title) Aboriginal Corporation; Delores Cheinmora and Others on behalf of Balanggarra (Combination)/Western Australia/Timothy Vincent Tatterson, Geotech International Pty Ltd* [2010] NNTTA 129 (‘*Wanjina-Wunggurr and Balanggarra v Western Australia*’)

*Ward v Western Australia* [1996] FCA 1452; (1996) 69 FCR 208; 136 ALR 557 (‘*Ward v Western Australia*’)

*Western Australia/Glen Griffin Venn Money/Jack Britten & Ors* [2001] NNTTA 53 (‘*Western Australia v Britten*’)

Western Desert Lands Aboriginal Corporation (Jamukurnu Yapalinkunu) RNTBC v Teck Australia Pty Ltd [2014] NNTTA 56 (*'WDLAC v Teck Australia'*)

*Wilfred Goonack & Others (Uunguu)/Western Australia/Kimberley Bauxite Pty Ltd* [2010] NNTTA 142 ('*Goonack v Kimberley Bauxite Pty Ltd*')

*Goonack & Others/Western Australia/Geotech International Pty Ltd & Anor* [2009] NNTTA 72 ('*Goonack v Geotech International Pty Ltd*')

*Wilma Freddie & Others on behalf of the Wiluna Native Title Claimants/Western Australia/Kingx Pty Ltd*, [2011] NNTTA 170 ('*Freddie v Western Australia*')

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

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| **Representatives of the native title party:** | Mr Robert Powrie, Kimberley Land Council<br>Ms Jemma Arman, Kimberley Land Council |
| **Representatives of the Government party:** | Ms Sarah Power, State Solicitor's Office<br>Mr Matthew Smith, Department of Mines and Petroleum |
| **Representative of the Grantee party:** | Mr Ryan de Frank, Valperlon Bulk Commodities Pty Ltd |

**REASONS FOR DETERMINATION**

[1] On 29 July 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 E80/4791-I ('the proposed licence') to Valperlon Bulk Commodities Pty Ltd ('the grantee party'). The notice included 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). In accordance with s 29(4)(a) of the Act, the notification day specified was 31 July 2013.

[2] The s 29 notice describes the proposed licence as comprising 52 graticular blocks (approximately 172 square kilometres) with a centroid of $14^{o}$ 23' S, $126^{o}$ 44' E, located 208 kilometres north-westerly of Wyndham, in the Shire of Wyndham-East Kimberley.

[3] 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), which in this matter was 3 July 2013. As explained by ss 32(3) and s 30(1)(a) and (b) of the Act, the objection may be made by:

(a) any registered native title body corporate ('RNTBC') in respect of the relevant land or waters who is either (i) registered as an RNTBC at three months after the notification day, or, (ii) if the RNTBC is registered after that three month period, the RNTBC has resulted from a claim that was registered before the end of three months from the notification day; or

(b) 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 for this matter was 31 July 2013. The three month period for filing a native title claim was 31 October 2013. The four month period for lodgement of objections was 30 November 2013, and by the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the closing date for lodgement became 2 December 2013, the next working day.

[5] The proposed licence is wholly overlapped by the Balanggarra Combined native title determination (WCD2013/005, WAD6027/1998, determined 7 August 2013) with the

Registered Native Title Body Corporate being the Balanggarra Aboriginal Corporation (*Cheinmora v State of Western Australia (No 2)*). As a result of that determination, exclusive native title exists over the proposed licence.

[6] On 4 September 2013, the Balanggarra Aboriginal Corporation ('the native title party') lodged an objection application with the Tribunal in respect of the proposed licence. On 23 September 2013, the application was accepted by the Tribunal and on 24 October 2013 I was appointed as Member for the purposes of any inquiry.

[7] On 17 December 2013, a preliminary conference was held at which the native title party representative advised a heritage protection agreement had been forwarded to the grantee party representative for review. At the second conference on 28 January 2014, it was reported the grantee representative had forwarded comments to the native title party representative and that parties were still negotiating the terms of the agreement. On 30 April 2014, a status conference was held at which the native title party representative confirmed that further comments had been exchanged and that parties were hopeful an agreement could be reached. At the following conference on 28 May 2014, the Tribunal convenor noted that, given the length of time already provided to parties, directions for an inquiry would need to be made. Accordingly, I set directions requiring each of the parties to lodge their submissions and following this, a Listing Hearing was to be held on 28 August 2014. In other words, the directions still provided the parties some three months to seek a negotiated outcome before the matter would be heard by the Tribunal again. Following a request from the grantee party for a one month extension, the directions were subsequently amended to allow an additional month.

[8] In accordance with the amended directions: the Government party's initial evidence was received on 11 June 2014 through the Department of Mines and Petroleum ('DMP'); the native title party submissions on 8 August 2014; the grantee party submissions on 21 August 2014; the Government party contentions on 5 September 2014; and the native title party reply on 19 September 2014.

[9] Prior to the listing hearing scheduled for 25 September 2014, the parties agreed to vacate the listing hearing and proceed to an inquiry 'on the papers', in accordance with s 151(2) of the Act. I am satisfied it is appropriate to make a determination in that manner.

[10] A map prepared by the Tribunal's Geospatial services was circulated to parties on 7 November 2014 and no party objected to the Tribunal using the map in the course of this inquiry.

## Legal principles

[11] Section 237 of the Act provides:

> **237 Act attracting the expedited procedure**
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> 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 Raelene Webb QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (at [15]-[21]).

## Evidence in relation to the proposed act

[13] 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 of the proposed licence;
- Reports and plans from the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs ('DAA Database');
- A copy of the proposed licence application;
- A Draft Tenement Endorsements and Conditions Extract; and
- A Tengraph Quick Appraisals detailing the land tenure, current and historical mining tenements, native title areas, relevant services, and other features within the proposed licence.

[14] The Quick Appraisal notes the proposed licence is subject to:

- Carson River Indigenous held pastoral lease I 3114/1056, overlapping at 21.3 per cent; and
- Common Reserve 21675 vested for the Use and benefit of Aboriginal Inhabitants, overlapping at 78.7 per cent ('Kalumburu Aboriginal Reserve').

[15] By virtue of *Cheinmora v State of Western Australia (No 2)*, the native title party holds 'the right to possession, occupation, use and enjoyment to the exclusion of all others' ('exclusive native title') over the area given ss 47 and 47A of the Act apply to the above tenure (at [5]). *Cheinmora v State of Western Australia (No 2)* also notes Kalumburu Aboriginal Reserve was vested in the Aboriginal Affairs Planning Authority (AAPA) on 15 June 1973 under Part III, section 27 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPA Act) (at 2(vi) at Schedule 4).

[16] According to the Quick Appraisal, the entire area falls within the West Kimberley National Heritage Listing (West Kimberly 106063). Other notable interests in the Quick Appraisal are:

- Department of Parks and Wildlife File Notation Areas 11063 and 11064 overlapping at 21.3 and 78.7 per cent respectively;
- Department of Water Ground Water Area 10 overlapping at 100 per cent;
- Department of Department of Parks and Wildlife Rain Forest Monitoring Site 3, overlapping at less than 1 per cent; and
- Eight Department of Parks and Wildlife Rain Forest Areas overlapping at less than one per cent each.

[17] The Quick Appraisal shows no current or pending mineral tenure over the proposed licence area. Previous mineral tenure granted was as follows:

- One surrendered exploration licence held from 2011 to 2012 overlapping at 19.2 per cent (E80/4439); and
- Three cancelled or expired temporary reserves, held from 1920 to 1921, 1929 to 1930 and 1958 to 1959 overlapping at 100 per cent, 71.7 per cent and 28 per cent respectively.

[18] This history suggests the area has not been subject to extensive exploration or mining activity. The Tengraph plan provided by DMP shows the surrendered exploration licence E80/4439 is located south of Putairta Hill - it did overlap the proposed licence at 19.2 per cent, but not within the portion of the proposed licence covered by

Kalumburu Aboriginal Reserve. The Quick Appraisal indicates the proposed licence contains the following services or features:

- Gibb River Kalumburu Road;
- Two unnamed minor roads;
- Three tracks;
- Two fence lines;
- One yard;
- Putairta Hill;
- Three cliffs, breakaways or rockridges;
- Five non perennial major watercourses including Parndia Creek;
- 25 non perennial minor watercourses including Tingun Creek; and
- Eight springs, soaks, rockholes or waterholes.

[19] The report from the DAA Database shows one registered site within the proposed licence; *Mungeru* (Site ID 14565), containing artefacts scatter and quarry with no gender restrictions. No other heritage places are noted.

[20] According to mapping prepared by the Tribunal, Kalumburu Aboriginal community lies approximately 3 kilometres north of the proposed licence, and the Gibb River/Kalumburu Road runs between the community and along the western side of the proposed licence. The Carson River station homestead and Carson River Aboriginal community lie approximately 5 kilometres south east of the proposed licence, and a track runs from the homestead and community and intersects the south eastern portion of the proposed licence at various points. A track also runs from the homestead and community to the Gibb River/Kalumburu Road.

[21] 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, and an additional condition relating to Kalumburu Aboriginal Reserve. 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 Licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.
6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
   - the grant of the Licence; or
   - registration of a transfer introducing a new Licensee;

   advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.
7. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Use & Benefit of Aboriginal Inhabitants Reserve 21675.

[22] There are no proposed conditions relating to the eight rainforest areas and the rainforest monitoring site within the proposed licence. It could be these areas are subject to other regulations or requirements but no party has led evidence to this effect.

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

1. The Licensee's attention is drawn to the provisions of the *Aboriginal Heritage Act 1972* and any Regulations thereunder.
2. The Licensee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.
3. The land the subject of this licence affects rainforest areas and a rainforest monitoring site. The licensee is advised to contact the Department of Environment and Conservation for detailed information on the management requirements for rainforest areas and rainforest monitoring site or sites present within the tenement area.
4. 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.

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

5. 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

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

7. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances 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:**

8. The abstraction of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless a current licence for these activities has been issued by the DoW.

**In respect to Waterways the following endorsement applies:**

9. Advice shall be sought from the DoW if proposing any exploration within a defined waterway and within a lateral distance of:

    - 50 metres from the outer-most water dependent vegetation of any perennial waterway; and
    - 30 metres from the outer-most water dependent vegetation of any seasonal waterway.

**In respect to Proclaimed Ground Water Areas (21) the following endorsement applies:**

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

## Submissions of the native title party

[24] The submissions of the native title party include: a statement of contentions; the affidavit of Mr Augustine Unhango sworn 31 July 2014; and the affidavit of legal officer Ms Jemma Maree Arman sworn 8 August 2014. Annexed to Mr Unhango's affidavit is a detailed topographical map showing notable places and landmarks, and the proposed licence which is demarcated in red. Annexed to Ms Arman's affidavit is: the Australian Securities Investments Commission (ASIC) Current Extract for the Carson River Pastoral Co. Pty Ltd dated 15 December 2010; the Department of Planning Kalumburu Community Corporation Community Layout Plan dated February 2011; the Australian Bureau of Statistics 2011 Census 'QuickStats: Kalumburu'; the Balanggarra Healthy Country Plan prepared by the Balanggarra Aboriginal Corporation and the Kimberley Land Council; and extracts from the DAA sites database showing the location of Milyungi (Site ID 12534), Mungeru (Site ID 14565) and Ongaru (Site ID 14566).

[25] Mr Unhango describes himself as a Balanggarra person and the senior person who can speak for the area of the proposed licence. As such, I accept he has authority to speak

on behalf of the native title party for the country which is subject to the proposed licence.

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

**Submissions of the grantee party**

[27] The grantee party contends the grant of the proposed licence is a future act attracting the expedited procedure and states:

> ...
>
> 4. It is important to the Grantee Party to establish and maintain strong relations with the Native Title Party
> 5. The Grantee Party intends to continue to engage with the Kimberley Land Council and the Native Title Party regarding the appropriate terms of a Native Title and Heritage Protection Agreement which meets the needs and requirements of the Native Title Party and recognises the early stage, low impact and greenfield nature of the proposed exploration and evaluation program
> 6. The Grantee Party welcomes the involvement of the Native Title Party, for example a senior person like Augustine Unhango, in collaborating regarding the implementation of the proposed exploration and evaluation program to ensure there is no interference with community and social activities of the Native Title Party or areas important to the Native Title Party's traditions within E80/4791

**Submissions of the Government party**

[28] Consistent with the native title party contentions, the Government party contentions address only ss 237(a) and (b) of the Act. It contends '[i]n the absence of any submissions or evidence regarding major disturbance to land or waters pursuant to s237(c) of the NTA, it is impossible for the Tribunal to be satisfied that the grant of the proposed tenement will involve a major disturbance to land or waters'(at 69).

[29] Further details of the Government party submissions are outlined in the consideration of s 237 of the Act below.

## Considering the Evidence

### Aboriginal Reserve Land and the Expedited Procedure

[30] As noted previously in this decision (at [14]-[15]) the proposed licence and surrounding area is overlapped by Carson River Indigenous owned lease at 21.3 per cent and Kalumburu Aboriginal Reserve at 78.7 per cent. The native title party holds exclusive native title over the entire area of both tenures (*Cheinmora v State of Western Australia (No 2)* at [5]). *Cheinmora v State of Western Australia (No 2)* also notes Kalumburu Aboriginal Reserve was vested under Part III, section 27 of the AAPA Act (at 2(vi) at Schedule 4).

[31] The Tribunal has, on numerous occasions, found that the regulatory regime applicable to Aboriginal Reserve land subject to Part III of the AAPA Act is such that an exploration licence is unlikely to cause the interference or disturbance referred to in s 237 of the Act (see *Cheinmora v Heron Resources* at [21] and cases cited therein). That matter also involved the native title party and described the consultative process which forms an integral part of the regulatory regime (at [21]-[24]). The Tribunal was required to make a determination over two exploration licence applications: E80/2951 and E80/2953. The entirety of E80/2951 was overlapped by Kalumburu Aboriginal Reserve, and according to the DMP Tengraph Plan (as outlined at [13] above), abutted the western side of the proposed licence with no overlap. E80/2953 was partially overlapped by Kalumburu Aboriginal Reserve and Carson River pastoral lease. According to the DMP Quick Appraisal and Tengraph Plan (as outlined at [13] above), E80/2953 lay south and west of the proposed licence with a 32.7 per cent overlap. The Tribunal concluded it was likely the Aboriginal community residing on Kalumburu Aboriginal Reserve comprised a significant number of persons who were members of the native title party (unlike the finding in *Ngalpil v Glengarry Mining* (at [23])). Therefore, the Tribunal was able to conclude that the native title party would, as part of the regulatory regime applicable to the Reserve, be consulted prior to any exploration activities being undertaken. Both the Government party and the native title party provided information concerning the consultation process and the Tribunal found:

> ...it likely that exploration on Reserve 21675 will be permitted only if an appropriate agreement with the native title party is in place...The Minister for State Development is unlikely to consent to mining until the Minister for Indigenous Affairs has authorised access to the exploration licence area. I therefore conclude that, because of the existence of this regulatory regime, it is not likely that any of the three limbs of s 237 are likely to

> be offended in relation to E80/2951 or that part of E80/2953 that falls within Reserve 21675 (at [24])

[32] Because E80/2951 was entirely overlapped by Kalumburu Aboriginal Reserve, the Tribunal found the expedited procedure was attracted. However, because a portion of E80/2953 was pastoral leasehold, the Tribunal was required to consider the contentions and evidence before making a finding in relation to E80/2953 (at [25]).

[33] The native title party have been determined to hold exclusive native title over the area of Kalumburu Aboriginal Reserve. It is, therefore, reasonable to assume that that a significant proportion of the Kalumburu community is comprised of members of the native title party and the Tribunal made this finding recently in *Balanggarra v Bar Resources* (at [48]). Furthermore, the native title party provides the same evidence as it provided in that matter, and contends the Tribunal should adopt the same finding (at 14 of its contentions).

[34] With reference to *Cheinmora v Heron Resources* and cases cited therein, I conclude that the interference contemplated under s 237 of the Act is unlikely to occur in the portion of the proposed licence which overlaps Kalumburu Aboriginal Reserve. No party has led any evidence that the regulatory regime described in *Cheinmora v Heron Resources* has changed in any substantial way since that time, and I also note that the native title party now holds exclusive native title over Kalumburu Aboriginal Reserve. I am now required to consider the contentions and evidence relating to the portion of the proposed licence which overlaps Carson River Pastoral Lease.

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

[35] The Tribunal is required to make a predictive assessment as to whether the grant of the proposed licence and activities undertaken pursuant to it are likely to interfere with the community or social activities of the native title party (in the sense of there being a real risk of interference) (see *Smith v Western Australia* at [23]). 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]).

[36] The full scope of activity to which the grantee party is entitled under the grant of an exploration licence is set out in s 66 of the *Mining Act:*

An exploration licence, while it remains in force, authorises the holder thereof, subject to this Act, and in accordance with any conditions to which the licence may be subject –

(a) to enter and re-enter the land the subject of the licence with such agents, employees, vehicles, machinery and equipment as may be necessary or expedient for the purpose of exploring for minerals in, on or under the land;

(b) to explore, subject to any conditions imposed under section 24, 24A or 25, for minerals, and to carry on such operations and carry out such works as are necessary for that purpose on such land including digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for the purpose in, on or under the land;

(c) to excavate, extract or remove, subject to any conditions imposed under section 24, 24A or 25, from such land, earth, soil, rock, stone, fluid or mineral bearing substances in such amount, in total during the period for which the licence remains in force, as does not exceed the prescribed limited, or in such greater amount as the Minister may, in any case, approve in writing;

(d) to take and divert, subject to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act water from any natural spring, lake, pool or stream situate in or flowing though such land or from any excavation previously made and used for mining purposes and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with exploring for minerals in the land.

[37] The *Mining Regulations 1981* outline the amount of material able to be removed from the exploration licence:

**20. Limit on amount of earth etc. that may be removed (Act s. 66(c))**

For the purposes of section 66(c) [of the Mining Act], the limit on the amount of earth, soil, rock, stone, fluid or mineral bearing substances which may be excavated, extracted or removed during the period for which the licence remains in force is 1 000 tonnes in total, and the excavation, extraction or removal of a larger tonnage, without the Minister's written approval, shall render the licence liable to forfeiture.

[38] The Tribunal has accepted 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. In *Silver v Northern Territory* at [29]-[30], Member Sosso (whose findings I adopt) 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.

[39] The Government party attaches the grantee party's statement in support of its application for the proposed licence. The statement indicates the aim of the grantee party exploration program is to identify bauxite or iron ore mineralisation, define a mineral resource and establish if the resource is commercially marketable and economically mineable. Exploration activities in the first year will comprise desktop research, Aboriginal heritage survey (if required) and rock chip sampling of approximately 200 samples. The second and third years comprise airborne surveys, a drilling programme of approximately 1500 samples and chemical assaying of the

drilling samples. The fourth and fifth years comprise an environmental study and feasibility study which may include further drilling and metallurgical test work. The Government party contends '[a]t most, the slight risk that the Grantee Party, exercising its full rights under the proposed tenement, might physically be in the way of a member of the Native Title Party in relation to the small area of land where they are operating on any given day is not substantial enough to constitute interference in the s 237(a) sense' (at 47(e), citing *Ward v Western Australia* at p.217 and *Silver v Northern Territory* at [23])

[40] In its contentions, the grantee party states:

> 5. The Grantee Party intends to continue to engage with the Kimberley Land Council and the Native Title Party regarding the appropriate terms of a Native Title and Heritage Protection Agreement which meets the needs and requirements of the Native Title Party and recognises the early stage, low impact and greenfield nature of the proposed exploration and evaluation program.
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> ...
>
> 7. The Grantee Party contends that any potential later activities on exploration license [sic] E80/4791 beyond the initial term of the proposed exploration license are irrelevant to this inquiry given that the act of applying for and having a mining license granted will in itself involve direct negotiation between the Native Title Party, the Grantee Party and the Government Party

[41] It appears that the grantee party is referring to the normal negotiation procedure under s 31 of the Act, which would apply if the grantee party subsequently sought a mining lease over the area and the native title party was notified under s 29 of the Act.

[42] My assessment of s 237(a) must be contextual, taking into account factors that may already have impacted on the native title party's community or social activities (such as mining or pastoral activity) (see *Smith v Western Australia* at [27]). In this matter, the Quick Appraisal provided by the Government party shows the area has not been subject to extensive exploration or mining activity and no evidence has been led as to what that activity, if any, was or was likely to be, or where such may have occurred on the proposed licence. The native title party have not indicated that any previous exploration activity has interfered or impeded their social or community activities in relation to this proposed licence and contend 'when the nature and extent of past or continuing mining activities is not divulged, the NNTT should not be persuaded to consider there has been interference which is probative in respect to NTP community and social activities (at 22, citing *Western Australia v Britten* at [54]).

[43] The native title party refers (at 14) to the following findings in *Balanggarra v Bar Resources* (at [48]) and contends that like findings should be made in this matter:

- The evidence shows that senior members of the native title party manage and control the Carson River pastoral lease alongside their exclusive native title rights and interests, and there are no other current interests which may affect the native title party's community and social activities (*Smith v Western Australia* at [27]);
- There is no evidence that any previous exploration activity which may have occurred on the proposed licence has interfered with the native title party social and community activities;
- The 2011 Census report submitted by the native title party indicates some 388 Aboriginal people live in Kalumburu Aboriginal community which is located 25 kilometres north of the proposed licence, and is also an area where the native title party holds exclusive native title (*Cheinmora v State of Western Australia (No 2)* schedule 5). It is reasonable to assume that a significant proportion of the community is comprised of members of the native title party;
- The contentions also refer to the Census in the low levels of median weekly earnings and full time work, and that 'the community experience financial hardship and relies on hunting to supplement their household needs' (at 25);
- There is no RSHA condition offered by the Government party, which might have provided for some consultation regarding exploration within the proposed licence. The Tribunal has accepted that, even though it is 'designed principally to deal with issues arising under s 237(b), the RSHA may have some relevance to s 237(a)' (see *Sturt v Baracus* at [55], citing *Tullock v Western Australia* at [48], and *Tullock v Western Australia* at [54]).

[44] As with *Balanggarra v Bar Resources*, the native title party provides the ASIC Current Extract for the Carson River Pastoral Co. Pty Ltd which lists seven directors. Four of the directors are listed as persons comprising the Applicant for the native title party's claim application (WC1999/047) being Augustine Unhango, Laurie Waina, Vernon Gerard and Clement Maraltadj. The ASIC Current Extract also notes the three shares of the company are held by Augustine Unhango, Pauline Unhango and Laurie Waina on behalf of the Kalumburu Aboriginal Community. In his affidavit for this matter, Mr Unhango deposes: that the company has 'a partnership with Government so that we're running cattle but also looking after country'; that he is both director of the station and 'a senior person for the area' so people speak to him both 'as a senior person and to make sure that it is safe to go in case there is anything happening at the station'; that he fences the station 'to keep the cattle in, and also to keep the cattle away from any special places'; and that as a 'Umbbugari ranger' he conducts traditional burnings on both the Kalumburu Aboriginal Reserve and the station with other rangers 'early in the season to stop those big late season bushfires (at 3, 8-10, 21-23). As with *Balanggarra v Bar Resources* I conclude that, from the above evidence, and with no evidence being presented to the contrary, pastoral interests are closely managed by senior members of the native title party and are integrated with their exclusive native title rights and

interests. The Tribunal also found it is reasonable to assume that a significant proportion of the Kalumburu community is comprised of members of the native title party and that, given the average median weekly income is low, the native title party rely upon hunting for food. I make the same finding here.

[45] The native title party also contends:

> 13. The evidence provided to the NNTT by the NTP deposes to the high probability the Grant will interfere directly with the carrying on by the NTP of their community or social activities. The evidence of Mr Unhango in relation to 'community and social activities' (section 237(a)) can be summarised as follows:
>
> (a) The tenement area is accessed by the NTP for hunting for cattle (*killer*), bush turkey (*bana*), kangaroo (*walumba*), goanna (*gariyali*) and for gathering bush apples, green fruit (*gelay*), blackberries (*goolangi and gantala*) and bush yam - [14], [18], [19];
>
> (b) The tenement area is accessed by the NTP for fishing for black bream (*amalat*), another fish that looks like black bream (*goongomari*), cat fish, barramundi, and *wungalbut* (rifle fish), and also for getting turtle- [16],[17];
>
> (c) Part of the tenement area is identified specifically as being accessed for *killer*, on account of *killer* always being "around that area" due to the proximity to a fresh water supply - [14];
>
> (d) Part of the tenement area is identified as being particularly good for fresh water fish, including one species of fish which is not found in a major adjoining freshwater supply - [17]; and
>
> (e) The NTP engages in caring for country activities i*n the tenement area, includ*ing fencing to "keep the cattle in, and also to keep the cattle away from special places" and fire burning activities to prevent late season bush fires - [21]-[23]....
>
> 26. The frequency of usage of the tenement area can be inferred from the evidence of the NTP that he goes "out for fresh water fish around the area marked in red and on the Carson and Drysdale River that surround it about once a week, sometimes once a fortnight"; the proximity of the [Kalumburu Aboriginal] community to the tenement area; and the evidence of the dependency of the community on fishing and hunting to supplement household needs.

[46] The Government party contends hunting and mineral exploration activities are, by their very nature, inherently capable of coexistence and the Tribunal has on numerous occasions found that to be the case. It contends there is no 'particular and very unusual evidence suggesting otherwise' in this matter (at 47(d)). The Government party made the same contention in *Balanggarra v Bar Resources* (at [48]). In that matter, the Tribunal did not accept that contention on the basis of the following evidence:

- The evidence indicates the specific area of the proposed licence is used by all the Kalumburu people, including members of the native title party for hunting on a regular basis. It is described as 'the best hunting ground for Balanggarra mob living in Kalumburu' and there is no evidence that other areas are used by the native title party in the same intensive way (Unhango affidavit at 9);
- The specific area of the proposed licence is the 'best area because in the dry season it is easy to get to, and because the hunting there is the best.... The road ... is good in the dry season.... you can [also] cross the Carson River, around where the homestead is.' (Unhango affidavit at 9-10). The area can be said to have unique qualities on this basis (*Freddie v Western Australia* at [39])

The Tribunal concluded (at [50]):

> While it is a fine judgement call in this matter to make this determination, there is just sufficient evidence from the native title party to indicate the future act is likely to be the proximate cause of interference with social and community activities in the form of hunting activities, which in the context of this proposed licence's easy access from Kalumburu, and reliance on that hunting by the community, would be substantial and not trivial in its impact on such activities

[47] In comparing the evidence provided in in this matter against that provided in, for example, *Balanggarra v Bar Resources* and *Gooniyandi v Western Australia*, I cannot conclude there is sufficient evidence to make a finding that the native title party's hunting or fishing activities are likely to be interfered with as a result of the grant of the proposed licence. There is insufficient evidence to conclude that the area of the proposed licence is used as intensively for hunting and is as unique as the hunting area described in *Balanggarra v Bar Resources* (at [48]). Nor is there sufficient evidence to conclude that the area of the proposed licence is used as intensively for fishing/camping and is as unique as the fishing/camping area described in *Gooniyandi v Western Australia* (at [47]-[49], [55]-[57]).

[48] However, the native title party in the present matter also outlines evidence in relation to burning in the proposed licence (at 27-31 contentions and Mr Unhango's affidavit at 23, including mapping). That fire is an important activity for the native title party is also supported by the Balanggarra Healthy Country Plan 2012-2022 which is annexed to Ms Arman's affidavit and which explains the significance of fire to the native title party rights and interests. I note that the Plan was developed with the native title party traditional owners, as well as others including Dr Tom Vigilante from the Kimberley Land Council, and Dr Kim Doohan who is a consultant anthropologist. The native title party argue that the Tribunal should accept the finding in *WDLAC v Teck Australia* (at [78]) that:

> As for traditional burning activities, I note that the evidence suggests these activities can cover large areas of country. Though this is not defined in precise terms, I accept there is a real likelihood, given the nature of the activity, that the grant of the proposed licences will interfere with the carrying on of the native title holders' traditional burning activities if the grantee party does not consult with the native title holders before entering the area.

[49] In that matter, the Tribunal went on to say (at [79]-[85]) that (emphasis added):

> [79] ...Given the existence of these conventions and Martu beliefs about the possible consequences of breaching them, *it is reasonable to expect that the native title holders would be reluctant to start burning in an area if there was a chance it could endanger the grantee party. The possibility that the grantee party might be in the area at a given time may directly interfere with the decision to carry out traditional burning, which would have a direct effect on the ability of the native title holders to observe their cultural obligations and carry on activities such as hunting and gathering that depend on intermittent burning.* This involves a different question than whether or to what extent the grantee party is likely to interfere with other community or social activities carried on in the proposed licence areas. What is relevant here is that, in the absence of consultation about the grantee party's intended exploration, it may be impossible for the native title holders to predict when and where the grantee party might be at any given time. That difficulty does not require the conclusion that the risk of interference cannot be measured and is therefore remote. Rather, it draws attention to a real and potential risk if activities were undertaken by the grantee party without prior consultation with the native title holders.
>
> [80] ...Unless specific arrangements are made about the interaction of these [grantee party and native title party] activities, I consider there is a real risk of interference with the ability of the native title holders to carry on this activity in a way that is consistent with their cultural obligations. This is not a case of indirect interference, but something that may directly affect the planning and implementation (that is, the carrying on) of traditional burning activities.
>
> [81] This is not to say that traditional burning activities are entirely unregulated. The *Bush Fires Act 1954* (WA) ('Bush Fires Act') provides that a person must not set fire to bush during a restricted burning time unless that person has a permit in writing from a bush fire control officer or chief executive officer of the local government and complies with prescribed conditions, though the person issuing the permit may modify or dispense with these conditions and incorporate additional requirements and directions (ss 18(6), 18(7)). 'Bush' in this context is defined to include 'bush, plants, stubble, scrub, and undergrowth of any kind whatsoever whether alive or dead' (s 7). In the Shire of East Pilbara, the entire year is designated as a restricted burning time.
>
> [82] The prescribed conditions impose certain requirements on the holder of a permit to give notice of its intention to burn bush and make arrangements for the management and control of the fire. Relevantly, the prescribed conditions require the permit holder to notify the chief executive officer or bush fire control officer of the local government; the owner or occupier of all adjoining land; a forest officer if the bush is located within three kilometres of forest land; and an authorised officer or employee of each 'notifiable authority' (Bush Fires Regulations 1954 (WA), reg 15B). An occupier of land is defined as 'a person residing on the land or having charge or control of it' and would therefore not include the

holder of a mining tenement (see *Adamson v Hayes* [1973] HCA 6; (1973) 130 CLR 276 at 288-289; *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* [2010] HCA 49; (2010) 241 CLR 576 at [28]- [36]).

[83] I acknowledge that additional requirements or directions could be incorporated into the permit to minimise the risk to those undertaking mineral exploration, including by requiring notice to be given to any person holding a mining tenement in the relevant area. However, in the absence of such requirements or directions, I am not satisfied the regime under the Bush Fires Act will minimise the risk to the grantee party and, in turn, the risk of interference with traditional burning activities.

[84] It is possible that s 211 of the Act would have the effect of disregarding any restrictions imposed by the Bush Fires Act. This would depend on whether traditional burning is a 'cultural or spiritual activity' for the purposes of s 211(3)(d) and whether, as a matter of statutory construction, the permit is only to be issued for research, environmental protection, public health or public safety purposes (see s 211(1)(b)(a) of the Act). As I have concluded that the requirements of the Bush Fire Act would not minimise the risk of interference with traditional burning activities, it is unnecessary for me to decide these issues.

[50] In the present matter, evidence has been provided that fire helps regulate fruits, bush medicine and grass relevant to native animals and that fire also has an important cultural element for the native title party, on these lands which are subject to exclusive native title. Both the grantee party and the Government party are silent with respect to the issue of burning. Taking into consideration the Tribunal's comments in *WDLAC v Teck Australia*, and that no information has been provided from the other parties, I am of the view that there is a real likelihood of interference with social and community activities relating to burning within the meaning of s 237(a), unless the normal negotiation process is followed.

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

[51] In relation to s 237(b), the issue the Tribunal is required to determine is whether there is likely to be (in the sense of a real chance or risk of) interference with areas or sites of particular (that is, more than ordinary) significance to the native title party in accordance with their traditions. As stated above at [21], the Register of Aboriginal Sites shows one registered site in the proposed licence, being *Mungeru* (Site ID 14565). This does not mean there are no other sites or areas of particular significance to the

native title party within the proposed licence area or in the vicinity. The Register of Aboriginal Sites does not purport to be a record of all Aboriginal sites in Western Australia and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters.

[52] Mr Unhango deposes the following sites are within the proposed licence:

- *Mungeru* 'there are footprints cut into the rocks. It looks like footprints in mud but it is in rock...That place can be hard to find – I know another senior Balanggarra man tried to take scientists there once but they couldn't find it. I know where it is and I've shown my kids. It is in an open area, close to hills' (24-26);

- *Burial place* 'Right close to Mungeru is where my grandmother is buried. In Balanggarra law, you have to respect and look after the place where your old people are buried. That's our law. That place is special to me and my family and other Balanggarra people respect that' (27-28)

- *Milyangi* 'a special place. It is close to the base of Puttairta [Putairta] hill. At Milyangi, in the dreaming a big rock fell from the sky and it split in half. Half of it landed up this way, north of Kalumburu. The other half landed at Milyangi and it made a big hole in the ground at Mool Mool and it kept going. Now there is fresh water there and it is a good spot for fishing. We also camp there. Milyangi is an important place for all Balangarra people because it is connected to the dreaming, and as senior person I have responsibility to look after it. Another senior man, Matthew Wainer, his cousin brother was *found* at Milyangi. That means that's where he came from; where his spirit is from.' (29-31)

- *Ongaru* 'another special site on the eastern side... There is a sacred rock there that you can't touch. If people touch it, a big storm comes and there's the biggest mob of lightening. The rock is white and smooth and polished. But if it wasn't pointed out to you, you probably wouldn't know what it was... If *kardiya* (white man) went to that rock without permission, they'd go silly. They'd just walk off like there was a string in their ear pulling them along. And they'd walk around in circles and come back to the same place that they started' (32-34)

[53] The native title party contends the above sites are of particular significance to the native title party (at 33), and I accept that contention. The Government party contends that in the event this is determined, 'the AHA and its associated processes are likely to prevent interference' and that the grantee party 'has also indicated a willingness to maintain a working relationship with the Native Title Party' (at 68).

[54] With the exception of the burial place, the Aboriginal names for each of the sites identified by Mr Unhango match the names of sites registered on the Register of Aboriginal Sites. Mapping prepared by the Tribunal and extracts from the Register provided by the native title party show the location and description of each site. *Mungeru* (ID 14565) is located along the boundary of the south eastern-most portion of the proposed licence and within the Carson River pastoral lease. *Ongaru* (ID 14566) is located approximately 3 kilometres east of the proposed licence near the Drysdale River and within Kalumburu Aboriginal Reserve. *Milyungi* (ID 12534) is located within the Carson River pastoral lease, approximately 480 metres south of the proposed licence, four kilometres south of Putairta Hill and four kilometres southeast of Mool Mool Lagoon. The location of each of the sites are mapped with buffer zones ranging between one and two kilometres. The native title party contends '[t]he location given for those sites by the NTP do not precisely match the location as included in the register. The register, accordingly, will not provide assistance to the Grantee in attempting to avoid those sites' (at 40).

[55] Mr Unhango deposes that each of the above sites are within the proposed licence and his evidence regarding the location of the sites is not contested by the Government or grantee party. Annexed to his affidavit is a detailed topographical map showing the location of the proposed licence in red, as well as various landmarks, waterways and services including Putairta Hill, Mool Mool Lagoon, Carson River, Drysdale River, the Kalumburu/Gibb River Road and adjoining station tracks. Mr Unhango is both the senior person to speak for the area on behalf of the native title party and a Director of Carson River Pastoral Station and I have accepted he has the requisite knowledge and authority to describe and locate sites relevant to this matter.

[56] In considering the evidence before me, it is reasonable to conclude that, *Mungeru*, the burial place and *Ongaru* are either within the area of the proposed licence, or very near to the proposed licence in terms of their actual substance or their exclusion area surrounding the site. Milyangi is recorded by the DAA as being just south of the

proposed licence, however, Mr Unhango's evidence indicates there is a significant area connected with Milyangi, between Putairta Hill and Mool Mool Lagoon (which area goes on across the proposed licence for approximately 3 kilometres), which is also connected with the dreaming of the native title party. I accept that each of these sites is of particular significance to the native title party. It is also reasonable to conclude that *Milyangi, Mungeru* and the burial place are located within Carson River pastoral lease, and that *Ongaru* is within Kalumburu Aboriginal Reserve. Given the regulatory regime applicable to Aboriginal Reserve Land described above, it is therefore unlikely that *Ongaru* will be subject to the interference or disturbance contemplated under s 237(b). However, in relation to *Milyangi, Mungeru* and the burial place, I will further explore the likelihood of interference and disturbance which is likely to occur through the grant of the proposed licence, based on the available evidence.

[57] The Government party states that interference is not likely because:

- the grantee party is aware of the existence of *Mungeru* and *Ongaru* ('the footprints and the weather rock') and 'has agreed to work with the Native Title Party to avoid interfering with such sites'
- exploration activities will be low impact and non intrusive
- the proposed licence has been subject to prior exploration activity (at 68)

[58] The Government party does not outline whether or not it accepts any of the sites outlined by the native title party as being of particular significance, but provides the reasons outlined at [57] of this decision should the Tribunal accept that any are of such a status. The Government party does not specifically refer to whether or not the grantee party will take into account the burial place or *Milyangi* with respect to its activities, but in broad terms I accept the grantee party has expressed its best intentions to collaborate with the native title party.

[59] However, though the Tribunal is entitled to have regard to the regulatory regime concerning Aboriginal Heritage, mining and the environment, it must consider the evidence presented in each case to decide whether the regime will be sufficient to make interference unlikely. Whilst there is no evidence to suggest the grantee will not comply with the AHA, I am not satisfied the AHA can provide sufficient protection for *Mungeru* and the burial place associated with *Mungeru* given its location is 'hard to find' even for members of the native title party (Mr Unhango's affidavit at 25). I am also not satisfied the AHA can provide sufficient protection for *Milyangi* given the

location and description on the Register of Aboriginal Sites differs from that described by Mr Unhango. Mr Unhango describes the site as being caused by a 'big rock' that fell from the sky 'close to the base of Puttairta [Putairta] hill...made a big hole in the ground at Mool Mool and it kept going' (29-31), suggesting the site is likely to cover a larger area than that indicated by the Register. The native title party rightly contends that compliance with the AHA necessarily depends on the ready identification of sites and that *Milyangi*, the burial place, and *Mungeru* are not readily identifiable and require assistance from the native title party to ensure interference does not occur (at 36-42).

[60] The Government party has not offered any condition requiring the grantee party to enter into a Regional Standard Heritage Agreement (RSHA) with the native title party if requested ('RSHA condition'). The RSHA condition has been offered by the Government party in other expedited procedure matters in the Kimberley region which have proceeded to an inquiry before the Tribunal (see for example *Warrwa #2 v 142 East Pty Ltd* (at [23])). Whilst the grantee party states it 'intends the continue to engage with...the Native Title Party regarding the appropriate terms of a Native Title and Heritage Protection Agreement' (at 5), it is not bound to that intention unless the full right to negotiate procedure contemplated under s 31 of the Act is followed. The grantee party has only provided its intentions in relation to the proposed licence in the broadest of terms.

[61] On the basis of the evidence provided in this matter, I find the grant of the proposed licence is likely to interfere with sites of particular significance to the native title party in accordance with its traditions.

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

[62] The native title party make no contentions regarding section 237(c) and the Government Party contends 'it is impossible for the Tribunal to be satisfied that the grant of the proposed tenement will involve a major disturbance to land or waters'(at 69). Nonetheless, the Tribunal is required under s 237(c) to make an evaluative judgement of whether major disturbance to land and waters is likely to occur (in the sense that there is a real risk of it) from the point of view of the entire Australian community, including the Aboriginal community, as well as taking into account the concerns of the native title party (see *Little v Oriole Resources* at [41]-[57]).

[63] As noted above, the proposed licence falls within the West Kimberley National Heritage Listing (West Kimberly 106063) and contains eight rainforest areas and one rainforest monitoring site. Whilst the Government party proposes to include endorsements which draw the grantee party's attention to the relevant environmental legislation regarding these areas, it does not propose any conditions relating to those areas. The licensee is only liable to forfeit the proposed licence if it breaches conditions.

[64] The Tribunal has, on a number of occasions found that a National Heritage Listing is not determinative of whether major disturbance is likely (see *Watson v Brockman Exploration Pty Ltd* at [75]).

[65] Based on the evidence and contentions submitted by the parties, which are very limited in this matter, 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 any major disturbance to land or waters on the proposed licence.

[66] I find the grant of the proposed licence is not likely to involve, or create rights whose exercise is likely to involve, major disturbance to land or waters.

## Determination

[67] The determination of the Tribunal is that the grant of exploration licence E80/4791-I to Valperlon Bulk Commodities Pty Ltd is not an act attracting the expedited procedure.

**Helen Shurven**
**Member**
**4 December 2014**