NATIONAL NATIVE TITLE TRIBUNAL

Keith Narrier and Others on behalf of Tjiwarl v WA Mining Resources Pty Ltd and Another **[2014] NNTTA 112 (3 December 2014)**

Application No: WO2013/1095

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

- and -

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

Keith Narrier and Others on behalf of Tjiwarl (WC2011/007) (native title party)

- and –

The State of Western Australia (Government party)

- and -

WA Mining Resources Pty Ltd (grantee party)

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

Tribunal:	Member Helen Shurven
Place:	Perth
Date:	3 December 2014

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act likely to interfere with sites or areas of particular significance – expedited procedure not attracted

Legislation:	*Native Title Act 1993* (Cth), ss 29, 30(1), 31, 32(3), 77, 109(1), 151, 155, 162(2), 237 *Mining Act 1978* (WA), s 66 *Aboriginal Heritage Act 1972* (WA), ss 17, 18
Cases:	*Butcher Cherel and Others/Western Australia/Faustus Nominees Pty Ltd* [2007] NNTTA 15, (‘*Cherel v Faustus Nominees*’) *Cheinmora and Others v Heron Resources Ltd and Another* (2005) 196 FLR 250 [2005] NNTTA 99 (‘*Cheinmora v Heron Resources*’) *John Walter Graham and Others on behalf of Ngadju v Dunstan Holdings Pty Ltd* [2014] NNTTA 84 (‘*Graham v Dunstan Holdings*’)

Karajarri Traditional Lands Association (Aboriginal Corporation) /Western Australia/ASJ Resources Pty Ltd [2012] NNTTA 18 (‘*Karajarri v ASJ Resources*’)

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

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

Maitland Parker and Others/Western Australia/Derek Noel Ammon [2006] NNTTA 65, (‘*Parker v Ammon*’)

Maitland Parker and Others/Western Australia/Iron Duyfken Pty Ltd [2010] NNTTA 60 (‘*Parker v Iron Duyfken*’)

Ronald Crowe & Ors (Gnulli)/Charlie Lapthorne & Ors (Thudgari People)/Western Australia/Zhukov Pervan, [2008] NNTTA 71 (‘*Crowe v Pervan’*)

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

Walley and Others v Western Australia and Another (2002) 169 FLR 437; [2002] NNTTA 24, (‘*Walley v Western Australia*’)

WF (Deceased) and Others on behalf of Wiluna v Tropical Resources Pty Ltd and Another [2014] NNTTA 104, (‘*Wiluna v Tropical Resources’*)

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:	Mr Mike Allbrook, Central Desert Native Title Services Ltd
Representatives of the Government party:	Mr Liam Nicholls, State Solicitor’s Office Mr Michael McMahon, Department of Mines & Petroleum
Representative of the grantee party:	Mr Hong-Jim Saw, Hetherington Exploration and Mining Title Services Pty Ltd

REASONS FOR DETERMINATION

[1] 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 E36/807 ('the proposed licence') to WA Mining 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). In accordance with s 29(4)(a) of the Act, the 'notification day' is specified in the notice as 3 July 2013.

[2] The proposed licence is 7BL in size (approximately 19.6 square kilometres) and is located five kilometres north west of Leinster, in the Shire of Leonora, Western Australia.

[3] The Tjiwarl native title claim (WC2011/007 – registered since 13 January 2012) wholly overlaps the proposed licence.

[4] An objection to the inclusion of the expedited procedure statement may be made to the National Native Title Tribunal ('the Tribunal') within four months of the 'notification day' (see s 32(3) of the Act), 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.

[5] On 1 November 2013, an expedited procedure objection application in relation to the proposed licence was lodged with the Tribunal by Keith Narrier and Others on behalf of the Tjiwarl Native Title Claim Group ('the native title party'). The application was accepted by the Tribunal pursuant to s 77 of the Act on 18 November 2013.

[6] At the preliminary conference held on 13 December 2013, the native title party and the grantee party indicated their intention to negotiate an agreement that would dispose of the objection by consent. Consequently, the matter was adjourned to allow negotiations to occur. At the status conference on 30 April 2014, the Tribunal set directions and programmed this matter for inquiry as an agreement had not been reached.

[7] On 14 May 2014, the Department of Mines and Petroleum ('DMP') provided evidence to the Tribunal and other parties on behalf of the Government party.

[8] Following a request from the native title party to vary compliance dates, directions were amended by the Tribunal on 3 June 2014. In compliance with those directions, the native title party provided a statement of contentions on 25 June 2014, together with an affidavit from Mr Kado Rentan Eldred Allison Muir, sworn on 11 June 2014. Upon submission of these documents, the native title party did not seek formal s 155 NTA disclosure directions, however, it did request that the contents of the affidavit be kept confidential and not be reproduced in the determination of the Tribunal. For the purposes of this determination I am agreeable to avoid, where possible, reproducing the contents of Mr Muir's affidavit. However, I also note that I am obliged to set out the findings of fact upon which this determination is based and to identify the source of those factual findings (see *Crowe v Pervan* at [35] and s 162(2) of the Act). As such, I have used discretion to ensure the contents of this affidavit have been kept confidential to the extent possible, while ensuring adequate disclosure to support the findings of this determination.

[9] On 25 November 2013, the State Solicitor's Office ('SSO') provided the Government party's statement of contentions and, on 6 August 2014, the native title party provided a statement of contentions in reply.

[10] On 27 August 2014, the Tribunal provided parties with a copy of a map produced by the Tribunal's Geospatial Unit to be used for the purposes of this determination, and no objections were received in response.

[11] I consider this a matter which can be determined 'on the papers' as provided for in s 151 of the Act, and I note that no party has requested otherwise.

Grantee party compliance

[12] Following the amendments made on 3 June 2014, directions stated that grantee party contentions and evidence were to be provided on or before 9 July 2014. The grantee party did not comply with this direction and did not submit a request for an extension of time in which to provide contentions and evidence. On 6 August 2014, the Tribunal wrote to all parties, noting that all parties except the grantee party had lodged submissions. The Tribunal sought the view of parties as to whether the matter could be determined on the papers. The same day, the grantee party confirmed it 'did not want to enter any contentions for this matter and are happy to proceed on the papers'. On 7 August 2014, being the day after the native title party had submitted their contentions in reply, the grantee party submitted to the Tribunal by email a statement of contentions. This correspondence provided no explanation for the cause of the delay, simply stating 'I was instructed to provide the attached. I note the lateness may affect the eligibility of the submission'. The submissions were four weeks out of time.

[13] The native title party objected to the Tribunal accepting the grantee party's late submissions on the basis that: no leave was sought to file those submissions; the native title party would be prejudiced in having to prepare a response at that late stage in the proceedings; accepting the late submissions would set a bad precedent for case management principles in expedited procedure matters; and it would be contrary to the intention of s 109 of the Act. The grantee party explicitly offered 'no further comments' to the native title party's comments about the out of time submissions. The Government party stated via email on 7 August 2014 it had 'no comments regarding the GP's submissions'.

[14] The Tribunal is required to carry out its functions in a fair, just, economical, informal and prompt way (s 109(1) NTA). With that in mind, I believe that acceptance of the grantee party's submissions would place a prejudicial burden on the native title party. As such, on 27 August 2014, I advised parties that leave to file the grantee party's submissions was not granted and therefore the contentions filed on 7 August 2014 would not form part of the considerations of this matter. On 2 September 2014, the Government party indicated they did not intend to concede the grantee party submissions should not be accepted, and believed they should in fact be accepted. On 2 September 2014, the native title party reiterated their objection to the acceptance of the grantee party's late submissions. On 3 September 2014, the Tribunal wrote to all parties as follows:

> The Tribunal takes an approach to requests for acceptance of late submissions which balances all factors. It certainly is not a decision which is taken lightly. All parties are aware of compliance dates, and the possible consequences should those dates fail to be complied with. The tipping factor in this matter was that the grantee party submissions were filed the day *after* the native title party submitted its contentions in reply. The contentions in reply only addressed the State's submissions, as the native title party were acting under the advice that the grantee party did not intend to provide submissions.
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> All parties are busy, have a number of matters on foot at any one time, of which this matter is only one of those many. The native title party objected to the Tribunal accepting the late grantee party submissions, including that they would be prejudiced in having to prepare a reply at this late stage in the proceedings if the grantee party submissions were accepted. The decision of the Tribunal remains that the grantee party's late submissions are not accepted – the matter is in inquiry, and will now be decided along with the multitude of other inquiry matters which the Tribunal has on its list.

Legal principles

[15] Section 237 of the Act provides:

> 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
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> (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.

[16] 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* (at [15]-[21]).

[17] I also adopt the principles outlined by Member McNamara in *Wiluna v Tropical Resources* at [13]-[16].

Evidence in relation to the proposed act

[18] The Government party provided: a statement of contentions; tengraph plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity of the proposed licence areas; a report and plan from the Department of Aboriginal Affairs' (DAA) Sites Register; a copy of the tenement

application; a copy of the proposed endorsements and conditions of grant; the instrument of licence; and quick appraisal documents.

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

- Department of Water Ground Water Area 21, overlapping at 100 per cent;
- Pastoral Lease 3114/899 (Leinster Downs) overlapping at 97.3 per cent;
- Gravel Reserve (CR41817) overlapping at 0.5 per cent;
- Leinster Townsite boundary overlapping at 0.4 per cent; and
- Road Reserve at less than 0.1 per cent.

[20] The proposed licence is overlapped by: three live mining leases, encroaching variously between 1.7 and 6.5 per cent; and one pending prospecting licence, overlapping 2.8 per cent. Dead tenements affected are: seven exploration licences in operation between 1991 and 2010, overlapping the proposed licence between 1.2 and 71.4 per cent; three mining leases in operation between 1988 and 2005, encroaching variously between 0.1 and 16.6 per cent; and 14 prospecting licences in operation between 1991 and 2014, encroaching variously between 0.1 and 8.9 per cent.

[21] The quick appraisal documents show the services affected in relation to this proposed licence include five tracks and one fence line.

[22] DAA Sites Register documentation indicates two registered sites in the proposed licence, being:

- 1202 Yellow Quarry, an artefacts scatter, quarry, open access, no gender restrictions; and
- 1203 White Quarry, an artefacts scatter, quarry, open access, no gender restrictions.

[23] DAA documentation also indicates one Other Heritage Place overlapping the proposed licence, being site 20789 TEL/15 Shallow Gnamma, a mythological site with file and boundary restrictions but no gender restrictions.

[24] The Tengraph plan provided by the Government party does not indicate any Aboriginal communities within or in the vicinity of the proposed licence area. This is confirmed by the map produced by the Tribunal's Geospatial Unit. I do note however, that the town site of Leinster is situated directly adjacent to the eastern border of the proposed licence and, as listed at [19] above, its boundary has a small area of encroachment over the proposed licence.

[25] The draft Endorsement and Conditions Extract for the proposed licence indicates that the grant will be subject to the standard four conditions imposed on the grant of all exploration licences in Western Australia (see *Tullock v Bushwin* at [11]-[12]). The following additional conditions would 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 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.
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> 6. The licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:
> 7. the grant of the Licence; or
> 8. registration of a transfer introducing a new licensee;
> 9. advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.
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> 10. No excavation, excepting shafts, approaching closer to the Goldfields Highway, Highway verge or the road reserve than a distance equal to twice the depth of the excavation and mining on the Goldfields Highway or Highway verge being confined to below a depth of 30 metres from the natural surface.
>
> 11. No interference with Geodetic Survey Station SSM-Sir Samuel 6 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.
>
> 12. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Gravel Reserve 41817 and Leinster Townsite Boundary.

[26] The following endorsements (which differ from conditions in that the breach of an endorsement does not make the licensee liable to forfeiture of the licence) will also be imposed on the grant of the proposed licence:

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's attention is drawn to the provisions of the:

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

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

5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the DoWs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.

In respect to Artesian (confined) Aquifers and Wells the following endorsement applies:

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

In respect to Waterways the following endorsement applies:

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

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

In respect to Proclaimed Ground Water Areas the following endorsement applies:

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

[27] Government party contentions state (at 18) that it will also place the following condition ('the proposed RSHA condition') on the grant of the proposed licence:

> In respect of the area covered by the licence the Licensee, if so requested in writing by Tjiwarl, the applicants in Federal Court Application no. WAD 228/2011 (WC2011/007), such request being sent by pre-paid post to reach the Licensee's address, not more than ninety days after the grant of the this licence, shall within thirty days of the request execute in favour of Tjiwarl the Regional Standard Heritage Agreement endorsed by peak industry groups and Central Desert Native Title Services.

Submissions of the native title party

[28] Although the native title party's objection application addressed each of the criteria in s 237 of the Act, the native title party states in its contentions that the objection is only pursued in relation to s 237(b) (NTP Contentions, paragraphs 1.3 – 1.4).

[29] The submissions of the native title party include a statement of contentions and the affidavit of Mr Kado Rentan Eldred Allison Muir, sworn on 11 June 2014. Annexed to Mr Muir's affidavit is a map showing the proposed licence and surrounding area produced by the Central Desert Native Title Services.

[30] Mr Muir states (at 1) that he is an initiated man - a *wati* - and has cultural authority to speak for the area of the proposed licence. Mr Muir also notes that he is a Tjarurru man, has family ties to the Martu people in the north and in other parts of the desert, and indicates (at 2-3) that he was shown a copy of the map 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.

[31] The native title party notes concerns about the State's regulatory regime, citing, for example, the WA Auditor General's report entitled *Ensuring Compliance with Conditions on Mining* dated September 2011 (at 2.16-2.17). The native title party states that I should adopt my decision in *Karajarri v ASJ Resources.* I do note my comments in that case as extracted by the native title party (at 2.18), including regarding various reports which had been written in relation to the weaknesses of the states regulatory regime. However, I also concluded in *Karajarri v ASJ Resources* (at [48]-[53]) that each matter must be dealt with on its individual facts to determine whether the protective regime is sufficient to make it unlikely that there will be interference with any sites of particular significance found to exist.

[32] The native title party also submits:

- The proposed licence contains sites of particular significance, being those created by the *tjukurrpa* (at 3.17(a); Mr Muir's affidavit at 6-7, 12, 17 and 25);

- The *Minyma Kunia Tjukurrpa* (carpet snake dreaming), *Tjitjipini Tjukurrpa* (many children dreaming), *Tjilkamata* (Echidna dreaming), *Mingari* (Mountain Devil dreaming) and *Tjutjuramal Tjukurrpa* (honey blossom dreaming) are all present in the proposed licence (at 3.17(b)-(d); Mr Muir's affidavit at 4, 7-9 and 12-20);

- The proposed licence contains ceremonial law grounds associated with increase ceremonies that are practiced by the native title party (at 3.17(e); Mr Muir's affidavit at 20-22);

- The dreaming stories at the sites within the proposed licence are associated with the transfer of ceremonial and cultural knowledge from the older generation to the younger generation of members of the native title party (at 3.17(f); Mr Muir's affidavit at 16-17);

- Objects closely associated with the *tjukurrpa* stories and increase ceremonies are present within the proposed licence and are only identifiable to people with the requisite cultural knowledge. Interference with these objects will prevent members of the native title party from practicing their traditional laws and customs (at 3.17(g)-(h); Mr Muir's affidavit at 17-22 and 25);

- The area of the proposed licence is of particular significance to the native title party and to people of the western desert generally (at 3.18; Mr Muir's affidavit at 4-12 and 20-22);

- The native title party have an obligation to maintain and protect sites of particular significance located within the proposed licence (at 3.19; Mr Muir's affidavit at 2, 4, 12, 20 and 23-28);

- The nature of the country on, and surrounding, the proposed licence is such that entry onto parts of the proposed licence and surrounds which have not been agreed with the native title party would be likely to result in interference within the meaning of s 237(b) of the Act; *tjukurrpa* tracks are not readily identifiable 'by persons other than those instilled in the mysteries of the *tjukurrpa*', and interference with one part may cause interference to sites and/or country located at other points along the *tjukurrpa* (at 3.20; affidavit of Mr Muir at 2, 4, 21 and 24-28);

- The nature and importance of the sites within the proposed licence is such that certain activities permitted will constitute interference pursuant to s 237(b) of the Act, but may not necessarily be prohibited under s 17 of the Aboriginal Heritage Act ('AHA') (at 3.21; affidavit of Mr Muir at 25-26 and 28); and

- Meaningful consultation and negotiation between the native title party and the grantee party are necessary to ensure that sites of particular significance are not likely to be interfered with, including due to the nature of the sites or areas of particular significance and issues such as access and gender restricted areas (at 3.31; Mr Muir's affidavit at 2 and 7-9).

[33] The native title party's contentions in reply submit that the Government party's proposed RSHA condition is an inadequate means of addressing issues arising under s 237 of the Act. Specifically, they contend that:

- The RSHA does not address circumstances where the disclosure of certain cultural information by the native title party would be culturally inappropriate, contrary to traditional law and custom, and may itself constitute an interference (at 2.5);

- In contrast to an RSHA in another jurisdiction which has 'a commitment to cooperate to ensure...the ongoing protection of Aboriginal heritage', the RSHA in this matter does not feature such a commitment (at 2.4);

- The RSHA only requires consultation prior to a s 18 AHA application and not consent, which will not prevent interference under s 237(b) (at 2.5); and

- The definition of non ground disturbing activity 'permits certain activities to proceed without a heritage survey being conducted, and where the native title party objects, for example on the grounds that such an activity would cause interference with a site of particular significance, the Grantee Party is only required to meet [with the native title party] to "endeavour" to resolve the matter' (at 2.6). They say that activities such as 'accessing the tenement, the use of hand tools for sampling purposes...the establishing of tent or caravan camps not involving heavy vehicles or water bores' (at 2.6) can proceed without a heritage survey being conducted. The native title party points out that the 'consent of the Native Title Party to these activities is not required, where the

Native Title Party has asserted that these will interfere with a site or area of particular significance' (at 2.6).

[34] The naive title party's contentions in reply also note that, given no contentions or evidence had been received from the grantee party, including any information pertaining to the grantee party's intentions, the Tribunal's predictive assessment should be made on the basis that the suite of rights afforded to the grantee party under the *Mining Act 1978* (WA) ('*Mining Act'*) will be exercised to the full. As noted earlier, the grantee party subsequently, and without leave, submitted contentions, which were not accepted.

Submissions of the Government party

[35] As the native title party did not pursue their objection in relation to s 237(a) and (c), the Government party only makes contentions relating to s 237(b), which will be addressed in this decision below as I consider the evidence provided.

Considering the Evidence

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

[36] As noted above at [28], the native title party has not made any contentions in relation to any community or social activities carried on in the proposed licence area. Notwithstanding the fact the native title party has elected not to address this issue, the Tribunal is nevertheless 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* at [8]).

[37] The native title party's evidence broadly describes some community or social activities conducted within the proposed licence area. Specifically, Mr Muir deposes that there are Dreaming places within the proposed licence that are used for increase ceremonies or rituals (at 20) and describes the fresh remnants of a women's ceremony he found in 2006/2007 within the proposed tenement (at 21). Mr Muir also states (at 23) 'my brother, Talbot Muir, has a camp about 2km west of that rockhole there. He hunts, collects bush tucker and visits and maintains rockholes and other sites when he goes out to that camp.' I

note that a southerly portion of the proposed licence does extend west by approximately 2km, but it is not clear if the rock hole Mr Muir is referring to is within the proposed licence. Mr Muir further states, 'people like Gaye Harris and others often go out and clean out rockholes like the one in the north of the Tenement.' On the basis of this evidence, I accept that members of the native title party engage in hunting, camping, collecting bush tucker and caring for country activities in areas within the proposed licence. However, as the evidence does not indicate how frequently the activities are carried on in these areas, it is difficult to conclude that the grant of the proposed licence is likely to interfere with these activities in a substantial way. The other parties did not provide contentions or evidence in relation to this limb of s 237 as the native title party did not pursue the objection on that limb.

[38] On this basis, I find that the grant of the proposed licence is not likely to interfere directly with any community or social activities of the native title party.

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

[39] 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 stated above at [22]-[23], the DAA Database shows two registered sites and one other heritage place overlapping the area of the proposed licence. This does not mean there may not be other sites or areas of significance, or of particular significance to the native title party within the proposed licence 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.

[40] The native title party contentions and evidence in relation to s 237(b) are outlined at [28]-[33] above. Mr Muir's affidavit states the proposed licence is situated adjacent to the area around the mining town of Leinster, and that this area is very important to desert people (at 4). He states (at 4) that the area is part of a number of important dreaming stories. Mr Muir describes a rock formation located at the entrance to Leinster which is associated with the carpet snake dreaming, or *Minyma Kunia Tjukurrpa* (at 6). However, it is not apparent if

this site is located directly on the proposed licence. He states (at 7) that 'nearby' there are other landscape features, including a significant water source, which are associated with the many children dreaming. He says this water source was used in pre-contact times and into recent times. However, again, it is unclear whether this water source is located within the propose licence. Mr Muir describes a rockhole in the northern part of the tenement associated with the echidna and mountain devil dreaming. He states (at 12) that this is an important rock hole and is still maintained and cared for by various members of the Tjiwarl claim group.

[41] Mr Muir describes two sites, located in the southern part of the tenement and approximately 50 metres apart from each other, which are associated with the honey blossom dreaming. One site he describes as a rockhole while the other is a rock formation. Mr Muir describes the rock formation in some detail and also explains its significance and uses. Mr Muir states (at 20) that these sites are associated with increase ceremonies that ensure good crops of honey blossom. Mr Muir states that a few years ago, around 2006/2007, he was travelling with others in the proposed licence and, when passing these sites, they noticed the ashes of a fresh campfire. He states that next to the campfire was a woman's digging stick, or *wana*, and they were able to recognise signs that women had conducted a ceremony at this increase site (at 21). He states that: they were very careful not to touch that *wana*; they were fearful it still had women's magic in it; and, it could cause considerable harm if they touched it. Mr Muir states that *wana* is still there today, near the road within the proposed tenement boundary (at 22). I note the two registered sites (both recorded as artefacts/scatters, quarries) and the other heritage place (recorded as a mythological site) are also in the southern portion of the proposed licence.

[42] Mr Muir states that his brother, Mr Talbot Muir, has a camp 2 kilometres west of the rock hole described above, and that he visits and maintains rock holes and other sites when he goes out to that camp (at 23). He states that any member of the native title party has the right to look after these rock holes and it is not unusual to see members of the native title party cleaning out rock holes in the proposed licence. As noted at [37], it is not clear from Mr Muir's statement whether the rock hole is within the proposed licence.

[43] Mr Muir notes that as a *wati*, an initiated man, he has responsibility to care for country and look after the *tjukurrpa*. He states that 'even someone going there and just chipping rocks might destroy those special places, they might take samples from the rock that is part of the

tjukurrpa...and disturb the other possessions, like the *wana* that are left in the tenement' (at 25).

[44] Finally, Mr Muir states that there are places that are unsafe for people to go and the native title party need to show them where they can go and what they can do so that they don't destroy the *tjukurrpa* (at 26).

[45] I accept Mr Muir's evidence regarding the existence of a number of sites in and around the proposed licence. However, for a number of the sites mentioned by Mr Muir, including a rock formation at the entrance to Leinster, a significant watercourse or soak and rock holes in the northern area of the proposed licence, it is unclear if they are located within the proposed licence area (and for some of the sites it is clear that they are not). Although the Tribunal has previously found interference with sites outside of a proposed licence as a result of the grantee party's activities may be relevant to s 237 considerations, the evidence must show a clear nexus between those activities and the issues to be considered (see *Silver v Northern Territory* at [35]).

[46] For several of the sites mentions by Mr Muir, insufficient evidence has been provided to show the site is of special or more than ordinary significance, for example a rock hole which he states is located in the northern part of the proposed licence (at 12). The Tribunal has held on numerous occasions that the native title party must provide evidence with sufficient detail and specificity to allow the Tribunal to make the predictive assessment required by s 237(b) (see for example *Parker v Iron Duyfken* (at [39]); *Cheinmora v Heron Resources* (at [43])).

[47] However, I am satisfied that the native title party's contentions and evidence demonstrate the two sites located in or near the southern portion of the proposed licence, described as a rock hole and a rock formation connected to the honey blossom dreaming, are sites of particular significance for the purposes of this determination. Due to a lack of specificity in the evidence, I can draw no firm conclusions about the other areas and sites mentioned in Mr Muir's affidavit.

[48] In undertaking a predictive assessment, the intentions of the grantee party in relation to the protection of sites of particular significance may be relevant to s 237(b) considerations (*Walley v Western Australia* (at [9])). For reasons outlined at [13]-[15] of this decision, the grantee party's submissions were not accepted and, therefore, there is no evidence in

relation to the grantee party's proposed activities over the proposed licence area, their attitude towards entering into an RSHA with the native title party, or how they intend to minimise the risk of interference with sites or areas of particular significance to the native title party. As such, consistent with the legal principles set out by the Tribunal in *Silver v Northern Territory* at [30]-[32], in the absence of evidence of the grantee party's intentions, the question of likelihood must be assessed on the basis that the rights given by the grant of the proposed licence will be exercised to the full. However, even in circumstances where it is assumed that a grantee party will exercise its rights to the full, it does not necessarily follow that a finding that interference is likely will be made. Even had the grantee party contentions been accepted, the native title party evidence in respect of these areas in the southern portion of the proposed licence is so strong that nothing short of consultation with the native title party regarding that area would ensure there was no likelihood of interference. I will expand on this further.

[49] The native title party expresses concern in their contentions about the adequacy of the State's regulatory regime (at 2.14-2.21). The regulatory regime based on the AHA has been described on numerous occasions by the Tribunal (see *Parker v Ammon* (at [31]-[38], [40]-[41])). While the Tribunal has usually found the site protection regime based on the AHA is sufficient to ensure any interference with sites of particular significance is unlikely, each matter must be considered on its own facts (see for example the summary of cases as outlined in *Cherel v Faustus Nominees* (at [81]-[91])). The Tribunal must consider, based on facts of a particular case and the nature and extent of sites of particular significance, whether this protective regime is sufficient to make it unlikely there will be interference with those sites. I also take into account the conditions and endorsements the Government party intends to impose on the grant of this proposed licence (as outlined at [25]-[27] above).

[50] The native title party's contentions argue there are circumstances where the AHA and the associated regime will not be sufficient to ensure that s 237(b) interference is unlikely, taking into account factors such as whether there is an area or site of particular significance and the nature and size of such an area or site (at 3.23). In this respect I agree with the native title party and have taken into account each of these factors in relation to this limb of s 237.

[51] The native title party's contentions in reply state that it does not accept the RSHA as an adequate means of dealing with issues under s 237 of the Act, and indicates that the Tjiwarl native title claim group has never endorsed the use of the RSHA and will not enter into an RSHA in this matter (at 2.3).

[52] The Government party challenge the native title party's contention that mere presence in the area may constitute interference. They state that 'interference must be substantial and involve actual physical intervention' (at 69) and cite the Tribunal's findings in *Silver v Northern Territory* (at [88]). I concur with the Government party on this point.

[53] The Government party states that s 237(b) protects physical sites and areas, not stories, customs or traditions, and, therefore, the dreamings described in Mr Muir's affidavit do not fall within the section's scope (at 62). Again, I agree with the Government party's contention that s 237(b) must deal with physical sites or areas and, therefore, dreamings alone may not fall within the ambit of this section. However, as stated in the Act, this section is concerned with 'areas or sites of particular significance, *in accordance with their traditions*, to the persons who are the holders of native title' (emphasis added). I consider the dreaming stories to be a means by which Mr Muir is demonstrating the particular significance of these sites and their connection to the native title party's traditions. Mr Muir is not relying on dreamings alone, but rather has discussed specific sites and areas, including rock holes, water sources, rock formations and ceremony sites and their relevance to these dreamings. He has explained their significance to the native title party's traditional law and custom and, therefore, I find the information highly relevant to this inquiry.

[54] The Government party's contentions (at 64) state that the *wana*, or woman's digging stick, that Mr Muir describes is an object rather than an area or site, and therefore it does not fall within the scope of s 237(b). Again, I do not entirely support the Government party's contention on this point. Were the evidence to present simply the *wana* as a site of particular significance, then I would need to assess whether this on its own could be considered a site for the purposes of 237(b). However, in the present matter I consider the *wana* as evidence in support of Mr Muir's contention that the rock formation and rock hole connected to the honey blossom dreaming are increase sites and are still used for increase ceremonies and rituals. Further, while there is no evidence that these sites are strictly gender restricted, there is evidence that there may be gender sensitivities relevant to my

considerations of whether the State's regulatory regime is sufficient to ensure interference is unlikely.

[55] The native title party cite a number of activities that the grantee party would be permitted to do under an exploration licence, including drilling, clearing land, and rock chipping, which they claim pose a risk of physical interference with the identified sites, particularly the areas in the southern portion of the proposed licence. Mr Muir states he has responsibility for looking after the *tjukurrpa* within the proposed licence (at 25). He states that if the *tjukurrpa* is damaged in the proposed licence by drilling or clearing of the land, then he would get into trouble from other *wati* (initiated men) and it would stop the native title party from being able to look after the *tjukurrpa*. He states that someone might take rock samples from the honey blossom dreaming rock formation and that might destroy those special places.

[56] The Government party contends this represents an overestimation of the activities of the grantee party in the event that the proposed licence is granted (at 71(c)). They state there is no evidence the grantee party is going to conduct activities which will have those effects and, therefore, the Tribunal should infer that no such effects will arise (at 71(c)). I don't believe the Government party's contentions on this point are entirely justified. The *Mining Act* sets out the rights conferred by the grant of an exploration licence (at s 66), and this includes the ability to extract or remove rock.

[57] I also note the Government party's proposed condition 10 contemplates the use of drill rigs, scrapers, graders, bulldozers, backhoes and other mechanised equipment if the approval of the DMP Environmental Officer is obtained.

[58] There is evidence of previous exploration, mining and pastoral activity on the proposed licence. However, there is nothing in the native title party's evidence which suggests this has interfered with sites of particular significance to date. There is also nothing specific in the Government party's evidence or contentions to indicate the nature and extent of any previous disturbance which may have occurred from such activities, apart from the general contention that such previous activity may have led to disturbance.

[59] Given the nature of the sites of particular significance within the southern portion of the proposed licence, including specifically the rock formation associated with the honey blossom dreaming, I am not satisfied, based on the available evidence, that the AHA and

its associated processes, together with the endorsements and conditions to be placed on the proposed licence, are likely to prevent interference with any area or site of 'particular significance' in the context of exploration activities.

[60] Taking all of these factors into account, I find there is a real risk of interference with sites of particular significance as a result of the grant of the proposed licence, as envisioned by s 237(b) of the Act.

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

[61] As noted above at [28], 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]).

[62] 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 above, 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.

[63] 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

[64] The determination of the Tribunal is that the act, namely the grant of exploration licence E36/807 to WA Mining Resources Pty Ltd, is not an act attracting the expedited procedure.

Helen Shurven
Member
3 December 2014