NATIONAL NATIVE TITLE TRIBUNAL

Leedham Papertalk and Others on behalf of Mullewa Wadjari v Raymond Vincent McMurdo & John Wallace Petrie and Another **[2014] NNTTA 114 (5 December 2014)**

Application No: **WO2014/0688**

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

- and -

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

Leedham Papertalk and Others on behalf of Mullewa Wadjari (WC1996/093) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Raymond Vincent McMurdo & John Wallace Petrie (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

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

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act likely to interfere directly with the carrying on of community or social activities – whether act likely to interfere with sites of particular significance – whether act likely to cause major disturbance to land or waters – expedited procedure attracted

Legislation: *Native Title Act 1993* (Cth), ss 29, 30(1), 31, 32(3), 151(2), 237
Aboriginal Heritage Act 1972 (WA)
Mining Act 1978 (WA), ss 48, 66
Acts Interpretation Act 1901 (Cth), s 36(2)

Cases: *Banjo Wurrunmurra & Others on behalf of the Bunuba Native Title Claimants/Western Australia/Monte Ling, Kevin Peter Sibraa* [2007] NNTTA 21 (‘*Wurrunmurra v Ling*’)
Champion v Western Australia (2005) 190 FLR 362; [2005] NNTTA 1 (‘*Champion v Western Australia*’)

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

Cosmos on behalf of the Yaburara & Mardudhunera/Western Australia/Croydon Gold Pty Ltd [2013] NNTTA 86 (‘*Cosmos v Croydon Gold’*)

Cyril Barnes and Others on behalf of Central East Goldfields People/Western Australia/Karl Christian Pirkopf [2012] NNTTA 50 (‘*Barnes v Pirkopf*’)

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

Leedham Papertalk & Ors on behalf of Mullewa Wadjari/Western Australia/Douglas Eric Kennedy, Leonard Geoffrey Haworth [2013] NNTTA 31 (‘*Papertalk v Kennedy*’)

Leedham Papertalk and Others on behalf of Mullewa Wadjari/Western Australia/Top Iron Pty Ltd [2013] NNTTA 64 (‘*Papertalk v Top Iron*’)

Leedham Papertalk and Others on behalf of Mullewa Wadjari v Boadicea Resources Ltd and Another [2014] NNTTA 90 (‘*Papertalk v Boadicea Resources*’)

Leedham Papertalk and Others on behalf of Mullewa Wadjari v FMG Pilbara Pty Ltd and Another [2014] NNTTA 98 (‘*Papertalk v FMG Pilbara*’)

Leedham Papertalk and Others on behalf of Mullewa Wadjari v Kalamazoo Resources Pty Ltd and Another [2014] NNTTA 108 (‘*Papertalk v Kalamazoo*’)

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

Papertalk and Others on behalf of Mullewa Wadjari v Harold John Stokes [2014] NNTTA 19 (‘*Papertalk v Stokes*’)

Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd [2003] NNTTA 62 (‘*Boddington v Bacome*’)

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

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

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

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

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

Yindjibarndi Aboriginal Corporation RNTBC v *FMG Pilbara Pty Ltd* [2014] NNTTA 8 (‘*Yindjibarndi v FMG Pilbara*’)

Representative of the native title party:	Mr Andrew Bower, Corser & Corser Lawyers
Representatives of the Government party:	Ms Gillian Bailey, State Solicitor’s Office Ms Bethany Conway, Department of Mines and Petroleum
Representative of the grantee party:	Raymond Vincent McMurdo & John Wallace Petrie

REASONS FOR DETERMINATION

[1] On 7 April 2014, the Government party, through the Department of Mines and Petroleum ('DMP'), gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E59/2042 ('the proposed licence') to Raymond Vincent McMurdo and John Wallace Petrie ('the grantee party'). The Government party included in the notice a statement that it considered the grant to be a future act that attracts the expedited procedure (that 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 9 April 2014.

[2] According to the notice, the proposed licence comprises an area of 4 graticular blocks (approximately 12 square kilometres) located 25 kilometres westerly of Yalgoo, in the shire of Yalgoo. The notice states the grant of an exploration licence authorises the applicant to explore for minerals for a term of five years from the date of the grant. The proposed licence is wholly situated within the registered native title claims of: the Mullewa Wadjari Community (WC1996/093 – registered from 19 August 1996); the Widi Mob (WC1997/072 – registered from 26 August 1997 to 4 May 1999 and from 12 December 2011); and the Wajarri Yamatji (WC2004/010 – registered from 5 December 2005).

[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 notice advised the three month closing date was 9 July 2014 and the four month closing date was 9 August 2014. By the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the four month closing date for lodgement became 11 August 2014 being the next working day.

[5] On 1 August 2014, an objection application was lodged with the Tribunal by Leedham Papertalk and others on behalf of Mullewa Wadjari ('the native title party') in respect of the proposed licence. An objection application was also made on behalf of the Wajarri Yamatji claim, but was subsequently withdrawn. No objection application was lodged by the Widi Mob.

[6] On 12 August 2014, the grantee party advised by email that it had executed a Regional Standard Heritage Agreement ('RSHA') 'with all parties concerned' and requested that the matter proceed to inquiry. Consequently, directions were issued for the conduct of the inquiry into the objection application, requiring each party to file a statement of contentions and supporting documentary evidence.

[7] DMP provided supporting documents on behalf of the Government party on 11 September 2014. The native title party provided a statement of contentions on 24 September 2014. The grantee party provided a statement of contentions on 3 October 2014 and the State Solicitor's Office provided the Government party statement of contentions on 22 October 2014. The Government party contentions were due on 27 August 2014 and therefore filed approximately 14 days late. However, I note that an email sent by the Government party indicates that the lateness was an error. No party objected to the late contentions and I accepted the contentions in the circumstances.

[8] A listing hearing was scheduled for 13 November 2014 but was vacated with the consent of the parties, who agreed to proceed 'on the papers' (that is, without a hearing) in accordance with s 151(2) of the Act. I am satisfied it is appropriate to make a determination in that manner.

[9] On 20 November 2014, the Tribunal provided parties with a map produced by the Tribunal's Geospatial Unit depicting the proposed licence and surrounding areas. The map was provided to assist with the determination of the objection application and no party objected to the Tribunal using the map for this purpose.

Legal principles

[10] 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
>
> (c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

[11] In relation to the legal principles to be applied in this matter, I adopt those outlined by President Raelene Webb QC in *Yindjibarndi v FMG Pilbara* at [15]-[21].

Evidence in relation to the proposed act

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

- 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 pursuant to the *Aboriginal Heritage Act 1972* (WA) ('AHA') ('DAA Register');
- Copy of the proposed licence application;
- Draft Tenement Endorsements and Conditions Extract; and
- Tengraph quick appraisal detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features.

[13] The Tengraph quick appraisal indicates that the proposed licence is entirely overlapped by Gabyon pastoral lease 3114/662 and Ground Water Area 17 (Gascoyne).

[14] The proposed licence has previously been subject to: eight surrendered, forfeited or expired exploration licences held between 1986 and 1999, overlapping at between 1.5 per cent and 72.6 per cent; seven expired or forfeited prospecting licences held between 1986 and 2011, overlapping at between 2.5 per cent and 12.4 per cent; one surrendered mineral claim, held between 1973 and 1974, overlapping at 10 per cent; and one surrendered gold mining lease held between 1981 and 1982 overlapping at 0.8 per cent. One current exploration licence entirely overlaps the proposed licence.

[15] The quick appraisal also shows two fence lines, two rock outcrops and 88 non perennial minor water courses overlapping the proposed licence.

[16] Reports from the DAA Register establish there are no registered sites or 'other heritage places' within the proposed licence area. There do not appear to be any Aboriginal communities within or in the vicinity of the area.

[17] The draft Endorsements and Conditions Extract for the proposed licence indicates the grant will be subject to the standard four conditions imposed on the grant of all exploration licences in Western Australia (see *Tullock v Western Australia* at [11]) and two standard conditions imposed for licences overlapping pastoral or grazing leases:

> 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.

[18] Unlike other matters involving the native title party, the Government Party does not propose a condition requiring the grantee party execute and forward a RSHA to the native title party ('RSHA condition'). It states the grantee party has indicated a

willingness to enter into the RSHA 'but has not been able to reach agreement with the Native Title Party on an appropriate fee schedule' (at 20).

[19] 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 [*sic*] attention is drawn to the provisions of the:
    - Waterways Conservation Act, 1976
    - Rights in Water and Irrigation Act, 1914
    - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
    - Country Areas Water Supply Act, 1947
    - Water Agencies (Powers) Act 1984
    - Water Resources Legislation Amendment Act 2007

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

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

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

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

In respect to Waterways the following endorsement applies:

7. Advice shall be sought from the DoW if proposing any prospecting 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.

Native title party submissions

[20] It appears the native title party has developed the practice of submitting contentions and affidavits based on pro forma versions of its objection applications which proceed to an inquiry before the Tribunal. In this matter, the native title party's contentions

bear a striking resemblance to those submitted in a number of previous matters (most recently in *Papertalk v Kalamazoo*, *Papertalk v Boadicea Resources* and *Papertalk v FMG Pilbara*). In *Papertalk v Boadicea Resources* [at 29], the Government party contended that seemingly identical evidence and contentions had been provided to the Tribunal in at least three other inquiries, each of which had dealt with areas some distance from one another and from the proposed licence for that matter (being *Papertalk v Stokes*; *Papertalk v Top Iron*; *Papertalk v Kennedy*). On that basis, the Government party contended caution should be exercised in considering the native title party's evidence and contentions, and the Tribunal should place less weight on the material than may ordinarily be expected, as it was not unique to the tenement area in that matter or specific to that inquiry.

[21] The native title party has not submitted any affidavit or other evidence in support of its contentions. The Government party contends, in the absence of evidence from the native title party, the Tribunal should conclude that the expedited procedure applies (at 26).

s 237 (a)

[22] The native title party's contentions addresses community or social activities. They refer to the native title party's regular four-day 'hunting weekends' within the proposed licence, as well as on the lands bounded by Geraldton, Nerramyne, Yuin Station and Yalgoo (at 10). Save for minor grammatical and formatting changes, the contentions are the same as those described recently in *Papertalk v Kalamazoo* (at [25]-[26]).

s 237(b)

[23] The native title party contends:

- the fact the DAA Register records no sites does not mean that no Aboriginal sites exist in the proposed licence (at 30);
- they 'are fearful of the adverse consequences which may befall them if their ancestors' spirits are disturbed by damage to or interference with the places that they inhabit' (at 31);

- the nature of some sites within the proposed licence 'is such that even non ground disturbing work may cause interference with the sites to a level that is distressing to the Native Title Party and culturally inappropriate to a degree that would constitute interference for the purposes of s 237(b) of the Act' (at 32);

- any significant sites existing within the proposed licence cannot be adequately protected by the AHA because their locations are unknown to the grantee party (at 33); and

- there is a significant pool to the east of the proposed licence and a significant site, Walla Walla Rock, to the south (at 35).

s 237(c)

[24] In addressing the issue of major disturbance of land or waters, the native title party contentions (at 36) state that regard should be had to:

- the frequent use of the proposed licence and surrounding areas for worship, travel, hunting and gathering of bush tucker by the native title party;

- the use of the proposed licence area for the education of younger members of the native title party; and

- the potential existence of unregistered sites in the proposed licence area that are unknown to the grantee party.

Grantee party contentions and evidence

[25] The grantee party contends:

- 'There have been significant geochemistry (614 rock chip, soil sample and stream sediment testing) campaigns across the tenement... We can only extrapolate that this exploration activity did not interfere with community activities, interfere with areas of particular significance or cause major disturbance to the land' (at 2);

- ‘Our proposed prospecting areas... will be very small over the previously worked areas... [and] will initially be geological mapping and interpretation, rock chip, stream sediment and lag sampling. This will be achieved by hand held tool such as shovels and picks... [and] if any results are encouraging, ...metal detectors, hand auger type drills resulting in disturbing small areas of surface material... We will enter the land on established tracks with standard four wheel drive vehicles... We do not have any large financial resources available to us hence no large vehicles or machinery and equipment will be used. Therefore no large trenches, pits or tunnels will be created ’ (at 8,9, 11 and 17); and

- it is aware of the Aboriginal Heritage Act (AHA) and its obligations under the AHA. It has offered an RSHA to the native title party but is not in a financial position to agree to the native title party’s higher fee schedule as they are small hobby explorers (at 4-6).

Considering the Evidence in context of s 237 of the Act

Community or social activities (s 237(a))

[26] The Tribunal is required under s 237(a) to make a predictive assessment of whether there is a real risk or chance that the grant of the proposed licence will directly interfere with the community or social activities of the native title party. The notion of direct interference involves an evaluative judgment of whether each proposed licence is likely to be the proximate cause of the interference, which must be substantial and not trivial in its impact on community or social activities (see *Smith v Western Australia* at [23]). The assessment is also contextual, taking into account factors such as mining or pastoral activity that may have already affected the native title party’s community or social activities (see *Smith v Western Australia* at [27]).

[27] As noted above (at [20]-[21]), the native title party has provided no evidence in support of its general contentions which are almost identical to those provided in previous matters before the Tribunal.

[28] The Government party contends that: hunting and mineral exploration are, by their nature, inherently capable of coexistence; the Tribunal has found that to be the case on

numerous occasions, and there is no particular or unusual evidence to indicate otherwise (at 47(g)). It also draws to the Tribunal's attention the grantee party's proposed exploration activities which will be low impact and non-intrusive (at 47(f)). Any ground disturbing activities will not adversely impact on heritage sites and will respect local Aboriginal cultural concerns (at 47(a)). Finally, it contends the native title party's access to the proposed licence is unlikely to be prevented given the limited nature of rights held by an exploration licensee (at 47(i)).

[29] As noted above, the evaluation of the likelihood of direct interference with community or social activities is a contextual exercise. In performing that exercise, the Tribunal is entitled to have regard to the previous and contemporary use of the land or waters and its effect on the activities identified by the native title party (see *Tullock v Western Australia* at [122]). The Tribunal's decision in *Champion v Western Australia* illustrates this point. In that matter, the Tribunal observed (at [64]) that, despite a long history of mining and pastoral activity in the area, there was no evidence these activities had had a detrimental effect on the native title party's community and social activities.

[30] In the present case, there is evidence the land and waters have been subject to prior mineral exploration interests and possibly mining activity. It is also entirely covered by a pastoral lease. As the Tribunal observed in *Western Desert v Teck Australia* (at [123]), it does not necessarily follow from the grant of a mining tenement that exploration or mining has actually taken place. However, in this matter, the grantee party has provided evidence of substantial mineral exploration over the proposed licence. It is reasonable to infer that the rights conferred on the holders of previous tenements were exercised to some degree, if not to their full extent and there is no evidence that the exercise of these rights have had any effect on the community and social activities identified by the native title party.

[31] Similarly, the Tribunal is entitled to take into account the extent to which the identified community and social activities may be carried on over a wider area. In *Boddington v Bacome,* the Tribunal found (at [44]) that evidence presented by the native title party over four inquiries indicated that the community and social activities were 'carried out over [a] very wide geographic area' (of which the act in question only comprised 'a small fragment'). As the evidence did not establish that the land

and waters concerned had greater importance for the activities than the surrounding country, the Tribunal was not satisfied they were likely to be directly interfered with by the grant of the future act. In subsequent cases, the Tribunal has taken into account the size of the act relative to the claim area in determining the likelihood of direct interference with community and social activities (see for example *Cheinmora v Heron Resources* at [31]; *Wurrunmurra v Ling* at [21]).

[32] The native title party's submissions on interference with community or social activities are focused on the hunting weekends said to be carried on by members of the claim group in the proposed licence and elsewhere within the claim area. I note that near identical evidence and contentions have been provided by the Tribunal in at least six other inquiries (see *Papertalk v Kalamazoo, Papertalk v Boadicea Resources, Papertalk v FMG Pilbara, Papertalk v Stokes*; *Papertalk v Top Iron* and *Papertalk v Kennedy*). On this basis, it is reasonable to assume the activities identified are not unique to the proposed licence or specific to this inquiry and are undertaken in a much larger area.

[33] In the circumstances, taking into account the lack of evidence before me and the matters previously considered by the Tribunal, I find the grant of the proposed licence is unlikely to directly interfere with the carrying on of the native title party's community and social activities.

Sites of particular significance (s 237(b))

[34] 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 chance or risk of) interference with areas or sites of particular (that is, special or more than ordinary) significance to the native title party in accordance with its traditions. As noted above at [16], there are no registered sites or 'other heritage places' within the proposed licence. However, the DAA Register does not purport to be a record of all Aboriginal sites in Western Australia, and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters.

[35] The native title party does not provide any evidence of sites or areas within the proposed licence that may be affected. Although its contentions refer to Walla Walla Rock and a nearby pool as sites of significance, it states that neither are located within the proposed licence (at 35).

[36] The identification of areas or sites of particular significance is a precondition to the inquiry under s 237(b) (see *Yindjibarndi v FMG Pilbara* (at [125]). As information about areas or sites of this kind is peculiarly within the knowledge of the relevant native title holders, any failure on the part of the native title party to produce evidence about their existence may lead the Tribunal to draw an unfavourable inference in the application of its common sense approach to the evidence (see *Ward v Western Australia* at [24]). In previous matters, the Tribunal has held that, where a native title party asserts that an area or site is one of particular significance, the area or site must be identified and the nature of its significance explained (see *Silver v Northern Territory* at [91]).

[37] There is no evidence which establishes the existence of areas or sites of particular significance within the proposed licence and, therefore, I am not in a position to consider whether the grant is likely to interfere with areas or sites of this kind. Nonetheless, if there are sites which are significant to the native title party, I am satisfied that interference would be unlikely given that: the grantee party is willing to enter into an RSHA with the native title party; most of the proposed activity will be low impact and non-intrusive; and any ground disturbing activities will be conducted in a way which will not adversely impact on heritage sites and respect local Aboriginal cultural concerns.

[38] Taking these matters into account, I find the grant of the proposed licence is not likely to interfere with areas or sites of particular significance in accordance with the traditions of the native title party.

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

[39] The task of the Tribunal in relation to s 237(c) of the Act is to determine whether there is a real chance or risk of major disturbance to land and waters. The term ‘major disturbance’ is to be given its ordinary English meaning as understood by the whole

Australian community, including Aboriginal people (see *Little v Oriole Resources* at [52]-[54]). The concerns of the Aboriginal community including matters such as community life, customs, traditions and cultural concerns are relevant to evaluating the degree of disturbance; however, the concerns must relate to direct, physical disturbance arising from the act or any rights created by it (see *Cosmos v Croydon Gold* at [29]).

[40] The native title party contends the Tribunal should have regard to: the frequent use of the proposed licence and the surrounding areas for worship travel and hunting and gathering of bush tucker by members of the Mullewa Wadjari community; the use of the area for the education of younger members of the community; and the potential existence of unregistered sites that are unknown to the grantee party (at 36).

[41] The Government party contends (at 68) the 'Native Title Party's contentions do not provide evidence of any 'major disturbance' to land or waters resulting from the grant' of the proposed licence and contends the major disturbance contemplated under s 237(c) is unlikely because (at 71) :

- the grantee party has stated most of its proposed exploration activities will be low impact and non-intrusive. Any ground disturbing activities (such as exploratory drilling) will not adversely impact on heritage sites and will respect local Aboriginal cultural concerns;

- the exercise of rights conferred by the proposed licence will be regulated by the State's regulatory regimes with respect to mining, Aboriginal heritage and the environment. It is likely these regimes will together and separately avoid any major disturbance to land and waters;

- any authorised disturbance to land and waters caused by the grantee party may be mitigated pursuant to proposed conditions requiring rehabilitation of the land following completion of exploration;

- the area of the proposed licence has been subject to prior mineral exploration and possible mining activity, and is entirely covered by a pastoral lease. The activities contemplated by the grantee party would be the same as, or no more significant than, the previous and continuing use of the area;

- the proposed tenement covers a relatively small area (only 4 blocks) compared with other exploration licences; and

- it does not appear the proposed licence has any particular characteristics that would likely result in major disturbance to land and waters arising given the activities proposed by the grantee party.

[42] In relation to the use of the area by members of the native title party for various purposes, I have already concluded the grantee party activities on the proposed licence is unlikely to directly interfere with the community and social activities of the native title party. To the extent the native title party's contentions rely on assertions about the existence of unspecified sites, I am unable to conclude on this basis that the proposed licence is likely to involve major disturbance for the purposes of s 237(c).

[43] In evaluating the risk of major disturbance, I have also had regard to the following:

- the area of the proposed licence is subject to a pastoral leasehold. It is likely that disturbance has already occurred in these areas;

- the proposed licence will be subject to conditions requiring the grantee party to rehabilitate all disturbances to the surface of the land made as a result of exploration and the removal of all waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings at the end of the exploration program; and

- there is no evidence the grantee party is likely to fail to comply with the relevant regulatory regimes.

[44] Taking all of these considerations into account, I find the grant of the proposed licence is not likely to involve major disturbance to the land and waters concerned.

Determination

[45] The determination of the Tribunal is that the act, namely the grant of exploration licence E59/2042 to Raymond Vincent McMurdo and John Wallace Petrie, is an act attracting the expedited procedure.

Helen Shurven
Member
5 December 2014