NATIONAL NATIVE TITLE TRIBUNAL

***Balanggarra Aboriginal Corporation Registered Native Title Body Corporate v Bar Resources Pty Ltd* [2014] NNTTA 62 (7 July 2014)**

Application No: **WO2013/0852**

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 -

Bar Resources Pty Ltd (grantee party)

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

Tribunal: Helen Shurven, Member
Place: Perth
Date: 7 July 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 – 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: *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 State of Western Australia (No 2) [2013] FCA 768 (‘*Cheinmora 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*’)

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*’)

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*’)

Representatives of the native title party:	Ms Jacki Cole, Kimberley Land Council Ms Angela Booth, Kimberley Land Council
Representatives of the Government party:	Mr Warren Fitt, State Solicitor's Office Ms Bethany Conway, Department of Mines and Petroleum
Representative of the Grantee party:	Mr Eamon Cornelius, Western Tenement Services Pty Ltd

REASONS FOR DETERMINATION

[1] On 3 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 E80/4778 ('the proposed licence') to Bar 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 normal negotiations required by s 31 of the Act).

[2] The s 29 notice describes the proposed licence as comprising 63 graticular blocks (approximately 208 square kilometres) with a centroid of 14^{o} 34' S, 126^{o} 39' E, located 203 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 4 months of the 'notification day' (see s 32(3) of the Act). The objection may be made by either any registered native title body corporate, or any registered native title claimant, in respect of the relevant land or waters, who was entitled to notice of the future act (see s 29(2) of the Act).

[4] If there is no registered native title body corporate for the relevant land or waters when the notice is given, a registered native title body corporate may still object if they are a registered native title body corporate 3 months after the notification day or within 4 months after the notification day provided the relevant claim was registered before the end of 3 months after the notification day (see s 30(1)(b) and s 30(1)(c) of the Act).

[5] If there is no registered native title claimant for the land or waters when the notice is given, any person who 4 months after the notification day is a registered native title claimant for those lands or waters may still object, provided the application containing the claim was filed sometime before the end of 3 months after the notification day (see s 30(1)(a) of the Act).

[6] The notification date for this matter was 3 July 2013. The three month period for filing a native title claim was 3 October 2013. The four month period for lodgement of objections was 3 November 2013, and by the operation of s 36(2) of the *Acts*

Interpretation Act 1901 (Cth), the closing date for lodgement became 4 November 2013, the next working day.

[7] 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. Prior to the native title determination (and at the time of the objection application), the proposed licence was solely overlapped by the Balanggarra Combined native title claim application (WC1999/047, registered from 9 December 2004).

[8] On 1 August 2013, the native title party lodged an objection application with the Tribunal in respect of the proposed licence. On 16 August 2013, the application was accepted by the Tribunal and on 24 October 2013 I was appointed as Member for the purposes of any inquiry.

[9] Until 7 August 2013, the native title party with respect to the proceedings was the registered native title claimant for the Balanggarra Combined native title claim application (WC1999/047) (see s 29(2)(b)(i)). As the Balanggarra Aboriginal Corporation Registered Native Title Body Corporate now holds the determined native title in trust for the native title holders (*Cheinmora v State of Western Australia (No 2)*, s 56(2)(b)), it is now the 'native title party' in these proceedings (see s 29(2)(a) and the note at s 30(2) which states 'If a native title claim is successful, the registered native title claimant will be succeeded as a native title party by the registered native title body corporate').

[10] On 19 November 2013, a preliminary conference was held at which the grantee party representative requested a short adjournment to seek instructions from the grantee party. At the adjourned conference on 3 December 2013, the grantee party representative advised the Tribunal that the grantee party wished for the matter to proceed to an inquiry. Directions were set, although the native title party representative indicated that an extension may be requested given the remote location of the proposed licence. Following the conference, the native title party representative lodged a request for an extension for that reason. The native title party's request was not opposed by the Government or grantee party, and on 5 December 2013 I amended the directions, which amendments were emailed to all parties on the same day.

[11] In accordance with the amended directions, the Government party's initial evidence was received on 14 February 2014 through the Department of Mines and Petroleum ('DMP'), and the native title party submissions on 3 March 2014. The grantee party chose not to lodge submissions. At the listing hearing held on 3 April 2014, it was noted the Government party had not lodged its statement of contentions. The Government party representative requested further time to do so, and the native title party representative requested the opportunity for reply. The grantee party representative did not attend the conference, nor did it lodge any submissions. I agreed to the Government and native title parties' requests and consequently amended the directions, which were emailed to all parties.

[12] The Government party lodged its contentions on 17 April 2014. At the listing hearing on 8 May 2014, the grantee party representative did not attend. It was noted that although the grantee party had made the request for the matter to proceed to an inquiry, and had been included in all subsequent correspondence, it had not made any submissions or participated in further hearings. The Government and native title party representatives agreed they had no further submissions and the matter could proceed to be heard 'on the papers', in accordance with s 151(2) of the Act.

[13] A map prepared by the Tribunal's Geospatial services was circulated to parties on 5 June 2014, and no party objected to the Tribunal using the map in the course of this inquiry.

[14] I have reviewed the material before the Tribunal and I am satisfied the matter can be adequately determined 'on the papers', in accordance with s 151(2) of the Act.

Legal principles

[15] Section 237 of the Act provides:

> **237 Act attracting the expedited procedure**
>
> A future act is an ***act attracting the expedited procedure*** if:
>
> (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and
>
> (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and

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

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

Evidence in relation to the proposed act

[17] 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
- Two Tengraph Quick Appraisals detailing the land tenure, current and historical mining tenements, native title areas, relevant services, and other features within the proposed licence (dated 14 February and 16 April 2014 respectively).

[18] The two Tengraph Quick Appraisals are identical in terms, save for some minor topography. The Government Party advised (via email on 6 June 2014) that only major topography was selected by DMP staff when the 16 April 2014 Quick Appraisal was generated. The Government party submitted that because the detailed topography contained in the 14 February 2014 Quick Appraisal was not the subject of parties' submissions, the Tribunal should rely on the more recent 16 April 2014 Quick Appraisal. No party objected to the Government party's submission, however, I note that the native title party contentions and evidence were provided after the February Quick Appraisal and prior to the April Quick Appraisal. As such, I will rely on the information contained in both Quick Appraisal documents, for completeness ('the Quick Appraisals').

[19] The Quick Appraisals note the proposed licence is entirely overlapped by the Carson River Indigenous held pastoral lease I 3114/1056. According to the Quick Appraisal's, the entire area falls within the West Kimberley National Heritage Listing (West Kimberly 106063).

[20] Other notable interests in the Quick Appraisals are:

- Department of Parks and Wildlife File Notation Area 11063 overlapping at 100 per cent;
- Department of Water Ground Water Area 10 overlapping at 100 per cent;
- Department of Department of Parks and Wildlife Rain Forest Monitoring Site 37, overlapping at less than 1 per cent; and
- Four Department of Parks and Wildlife Rain Forest Areas overlapping at less than one per cent each.

[21] The Quick Appraisals show no current or pending mineral tenure over the proposed licence area. Previous mineral tenure granted was as follows:

- One surrendered exploration licence held from 1982 to 1984 overlapping at 74.8 per cent;
- Three exploration licences granted in 1996 and surrendered in 1997 overlapping at 67.4 per cent, 32.1 per cent and 0.4 per cent;
- One exploration licence granted in 2004 and surrendered in 2005 overlapping at 87.3 per cent;
- One exploration licence granted in 2006 and surrendered in 2009, overlapping at 95.2 per cent;
- One exploration licence granted in 2010 and surrendered in 2012, overlapping at 77.8 per cent, and another granted in 2011 and surrendered in 2012 overlapping at 7.9 per cent;
- 64 surrendered or cancelled mineral claims, held between 1969 and 1982 for between one and three years, overlapping at 0.6 per cent each; and

- Two cancelled temporary reserves, one held from 1920 to 1921 overlapping at 100 per cent and one held from 1980 to 1981 overlapping at 74.8 per cent.

The Quick Appraisals show three other exploration licence applications were notified under the Act following the registration of the native title party's claim application but were withdrawn prior to grant.

[22] This history suggests that some exploration activity may have occurred on the proposed licence, for relatively short periods of time respectively, since 1982.

[23] The Quick Appraisals indicate the proposed licence contains the following services:

- Gibb River Kalumburu Road;
- One unnamed minor road;
- One track;
- One fence line;
- Five cliffs, breakaways or rockridges
- Six non perennial major watercourses including Carson River and Young Creek; and
- Three waterholes or rockpools.

[24] The report from the DAA Database shows two registered sites and no heritage places within the proposed licence:

- 13349 Kunkungarrangay, a mythological site, open access, no gender restrictions; and
- 14743 Kimandu/Tilwillie Pool, containing skeletal material/burial, painting, engraving, camp, closed access, no gender restrictions.

[25] According to the mapping prepared by the Tribunal, Kalumburu Aboriginal community lies approximately 25 kilometres north of the proposed licence, and the Gibb River Kalumburu Road runs between the community and the northwest corner of the proposed licence. The Carson River station homestead and Carson River

Aboriginal community lie approximately 5 kilometres north east of the proposed licence.

[26] The Draft Tenement Endorsement and Conditions Extract indicates that 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. These 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.

[27] There are no proposed conditions relating to the four 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.

[28] 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.

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

4. 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

5. 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.

6. 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:

7. 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:

8. 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:

9. 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

[29] The submissions of the native title party include: a statement of contentions; the affidavit of Mr Augustine Unhango sworn 19 February 2014; and the affidavit of legal officer Ms Jemma Maree Arman sworn 3 March 2014. Annexed to Mr Unhango's affidavit is a satellite imagery map showing the Kalumburu community and the proposed licence which is demarcated as a green rectangle.

[30] 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.

[31] Also in support of its contentions regarding s 237(a), the native title party includes the affidavit of legal officer Ms Jemma Maree Arman sworn 3 March 2014, which attaches: the Australian Securities Investments Commission (ASIC) Current Extract for the Carson River Pastoral Co. Pty Ltd; the Department of Planning Kalumburu Community Corporation Community Layout Plan dated February 2011; and the Australian Bureau of Statistics 2011 Census 'QuickStats: Kalumburu'.

[32] 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) 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

[33] Although the grantee party made the initial request for the matter to proceed to an inquiry, and was included in all subsequent correspondence attaching amended directions, party submissions and details of Tribunal conferences and hearings, it did not lodge any submissions.

Submissions of the Government party

[34] The Government party contentions address only s 237(a) of the Act. It contends the native title party has not submitted the grant of the proposed licence is likely to interfere with areas or sites of significance, and that '[c]onsequently, the Government Party does not propose to address section 237(b)'. The Government party also contends that because the native title party does not make any contentions that the

grant of the proposed licence is likely to involve a major disturbance to land or waters, 'there is no need for the Government Party to address section 237(c)'(at 55-56).

Considering the Evidence

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 Government party attaches the grantee party's statement in support of its application for the proposed licence. The statement indicates its exploration activities in the first year will be confined to desktop research, geological field investigation, gridding and surface sampling, airborne surveys and a drilling programme. However, no further evidence or information is provided from the grantee party in support of this statement.

[37] The Tribunal has accepted that the intentions of the grantee party in a particular matter are relevant in assessing whether the activities are likely to directly interfere with the carrying on of a native title party's community or social activities, or interfere with areas or sites of particular significance to a native title party. In *Silver* 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.

[38] In the absence of any contentions or evidence from the grantee party regarding the remainder of their exploration programme, it is open for me to infer that the grantee party will, at least after the first year, exercise their rights under the *Mining Act* to the

full (see *Silver v Northern Territory* at [25]-[32]; *Ngarluma Indjibarndi and Wong-goo-tt-oo v WA* at [17]), and I do make that inference in this matter.

[39] The full scope of activity to which it 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.

[40] 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.

[41] 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, there has been previous grants of exploration licences over the area, suggesting it is likely there has been some previous exploration activity over the area, however 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.

[42] The proposed licence and surrounding area is entirely overlapped by Carson River Indigenous owned lease. The native title party holds 'the right to possession, occupation, use and enjoyment to the exclusion of all others' ('exclusive native title') by operation of s 47 of the Act (*Cheinmora v State of Western Australia (No 2)* at [5]). Consequently, the native title party contends that 'the usual risk assessment factors of the ongoing lawful activities of pastoralists prevailing over native title rights do not automatically occur..... The inference should be drawn that the native title holders are able to freely enter the pastoral lease and engage in traditional activities without undue restrictions' (at 15 and 17, citing *Ngarluma Indjibarndi and Wong-goo-tt-oo v WA* at [28]). In that matter, the Tribunal recognised the 'special nature' of Indigenous owned pastoral leases when undertaking its risk assessment, but also noted that the evidence presented by the native title party was critical.

[43] In the present matter, the Government party submits the native title party's contention is 'misconceived'. It contends the native title party's rights and interests are suppressed by the Carson River pastoral lease to the extent they are inconsistent, and that it is not entitled to control access or exclude persons from the area of the proposed licence (at 8 and 43).

[44] I disagree with the Government party's contention, as given the native title party's evidence, it is difficult to conceive, how or why, the native title party's rights and interests are restricted, suppressed or inconsistent with the current running of the pastoral lease. For example, in his affidavit, Mr Unhango deposes 'all the people who want to go hunting from Kalumburu, they go to [the proposed licence]', it is 'easy to get to' because the road 'is good in the dry season'. He states he is both the senior person for the area and a director of the station, so members of the native title party 'speak to me first' before going to the proposed licence 'for safety, so I can tell them what is happening on the Station ... [and] because that's the right thing to do, cultural way' (7-8).

[45] The (ASIC) Current Extract for the Carson River Pastoral Co. Pty Ltd submitted by the native title party lists seven directors, four of whom 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. Mr Unhango deposes that the company has 'a partnership with Government so that we're running cattle but also looking after country'; 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 'Balanggarra ranger' he conducts burnings on the proposed licence with other rangers (at 3, 13, 15 and 16). It appears from the above evidence, and with no evidence being presented to the contrary, that pastoral interests are closely managed by senior members of the native title party and are integrated with their exclusive native title rights and interests.

[46] The native title party contends:

> 11. The evidence of Augustine Unhango of 19 February 2014 ("Unhango affidavit") 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 meat, including kangaroo (walumba), turkey (bana), goanna (gariyali), as well as collecting bush applies, green fruit (gelay), black berries (goolangi), bigger berries (gantala) and bush yam – see Unhango affidavit at [11];
>
> (b) The tenement area is the "best hunting ground" for Balanggarra people living in Kalumburu aboriginal community – see Unhango affidavit at [9];
>
> (c) The tenement area is easily accessed by members of the community because the road is good – see Unhango affidavit at [9]-[10]; and
>
> (d) Families in Kalumburu aboriginal community rely on being able to hunt in the tenement area due to financial hardship – see Unhango affidavit at [17].

[47] The Government party does not contest the native title party's contentions (11)(a)-(c), but does contest (d), stating that the 'nutritional or economic significance of the food obtained by hunting does not assist' in assessing whether or not the grantee party's activities are likely to interfere with the native title party's hunting activities (at 48). I agree with that contention, although I do note the native title party's evidence of financial hardship indicates that the community activity of hunting occurs regularly on the proposed licence: according to Mr Unhango it is 'why so many people go out to [the proposed licence]' (at 17).

[48] 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 [or] very unusual evidence suggesting otherwise' in this matter (at 49). I do not accept that contention for the above reasons and the following:

- 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). And that the proposed licence area is 'the primary hunting ground of an Aboriginal community' (at 25);

- 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]); and

- Given the evidence that vehicle access to the area is only available in the dry season, it is reasonable to assume the grantee party will only be able to physically access the proposed licence at the same time as the native title party: The likelihood of the grantee party's exploration activities interfering with the native title party's hunting activities is higher than if access were available all

year, or if the parties were using the area at different times; or if different routes to the area were to be used;

- 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]).

[49] The Government party state (at 47), that 'Mr Unhango does not suggest that it [the proposed licence] is the only good hunting ground in the vicinity of Kalumburu...' However, what Mr Unhango does say is that it 'is the best hunting ground for Balanggarra mob living in Kalumburu' (at 9), and he goes on to explain that meat in the community shop is very expensive and 'so all families in Kalumburu rely on meat that they can hunt for food. Most mob here don't have a lot of money and there is a lot of meat at Young Creek [the proposed licence area]' (at 17).

[50] With reference to *Tullock v Western Australia* (at [86]), given the evidence of regular and unrestricted use of the proposed licence for hunting, the size of the proposed licence being over 200 square kilometres, a lack of information from the grantee party about activities it will perform on the area, where, and when, direct interference by the grantee party can be inferred. 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.

[51] Based on the evidence provided by the native title party, and in the absence of any evidence from the grantee party, I am satisfied it is likely that the grant of the proposed licence would interfere directly and substantially with the conduct of the social and community activities of the native title party in the area.

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

[52] 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 [24], the DAA Database shows two registered sites in the area of the proposed licence, and no 'other heritage places'. 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.

[53] The native title party has not produced any evidence concerning sites within the proposed licence and whilst it makes no specific contentions regarding subsection (b) of s 237, the native title party makes the following contentions which relate to that subsection:

> 28. The Grantee has expressed no intention of entering into a Heritage Protection Agreement and has provided no comment on the draft Heritage Protection Agreement provided to it by the NTP's representative (the Kimberley Land Council) on 1 August 2013.
>
> 29. The Grantee has at no time made any offer to the NTP to participate in heritage surveys or consult or enter into a dialogue with the NTP about identifying ways their (the Grantee's) activities could minimise interference to NTP community life.
>
> 30. The Grantee has not provided any information, at anytime, which might go to explain how it intends to consult with the NTP should the Grant be made.
>
> 31. It is therefore evident from the Grantee's conduct that it has no intention of engaging in any negotiation aimed at the parties entering into a heritage protection agreement.

[54] Furthermore, the Government party has made no submissions concerning s 237(b), nor has it 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') as has been offered in other expedited procedure matters in the Kimberley region which proceed to a determination (see for example *Warrwa #2 v 142 East Pty Ltd* at [23]).

[55] With reference to *Ward v Western Australia* (at [26]), whilst there is no evidential onus of proof on any party in any inquiry matter before the Tribunal, and although the

Tribunal may make its own inquiries, it is clear that knowledge of sites is largely held by the native title party alone. A common sense approach to evidence implies that failure by the native title party to produce evidence concerning sites may lead to an unfavourable inference. Given the lack of evidence before me, I find the grant of the proposed licence is not 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)

[56] The native title party make no contentions regarding section 237(c) and the Government Party contends '(a)s such, there is no need for the Government Party to address section 237(c)' (at 56). 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]).

[57] As noted above, the proposed licence falls within the West Kimberley National Heritage Listing (West Kimberly 106063) and contains four 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.

[58] 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]).

[59] In *Goonack v Kimberley Bauxite Pty Ltd* Member Sosso, on the issue of National Heritage Listing for which no party either drew to the attention of the Tribunal or made any submissions on the implications, held:

> It is a fundamental tenet of procedural fairness that an administrative tribunal must not base its decision on a ground not relied upon by the parties or raised either at a hearing, or when, as in this matter, on the papers, in the contentions lodged – see Fletcher v Federal Commissioner of Taxation (1988) 84 ALR 295 at 307-310. If the Tribunal intends to base its decision on material not raised in the contentions, it must

> notify the parties and give them an opportunity to address this matter – see Kunz v FCT (1996) 41 ALD 533; (at [29]).

[60] Member Sosso went on to hold:

> As the Tribunal has no material before it on the implications, if any, of heritage listing, it would be inappropriate for the Tribunal to engage in a unilateral fact finding exercise and then to possibly base its discretion on material that the parties had not seen or been given an opportunity to comment on; (at [30]).

[61] Member Sosso identified the findings of Member MacPherson in *Goonack v Geotech International Pty Ltd* where Member MacPherson found that as a heritage listing had not been raised, it had but peripheral relevance in the context of s 237(c) assessment. Nonetheless, Member Sosso commented that the heritage listing could have relevance to a s 237(c) risk assessment, and it may be helpful to address it in future inquiries; (at [28] and [30]).

[62] With reference to s 108(2), the Tribunal may carry out its own research for the purpose of performing its functions, which includes applications, inquires and determinations (s 108(1)). In *Western Australia v Thomas* it was held that as a matter of general practice, the Tribunal will not do so where the parties are represented. In *Hughes v Western Australia*, Member Sosso held that while the Tribunal has a wide degree of latitude in the performance of its functions, and is not bound by the rules of evidence, it will not invariably disregard those rules because it must base its determination on facts properly before it, and the rules of evidence normally provide a sound guide to the best means of obtaining and fairly assessing those facts.

[63] On 16 May 2014, the Tribunal wrote to all parties in relation to me considering whether or not to rely on several publically available documents in relation to the assessment of land types (notably the rainforest areas and the national heritage listing). Based on the Government party submissions which did not support reference to those documents, a lack of response from the grantee and native title party, and the limited submissions from all parties in relation to this limb of s 237, I decided to limit my consideration to materials provided by parties in this matter. This was communicated to parties on 13 June 2014.

[64] 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.

[65] 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

[66] The determination of the Tribunal is that the grant of exploration licence E80/4778 to Bar Resources Pty Ltd is not an act attracting the expedited procedure.

Helen Shurven
Member
7 July 2014