NATIONAL NATIVE TITLE TRIBUNAL

Kevin Cosmos and Others on behalf of the Yaburara & Mardudhunera Native Title Claim Group v Croydon Gold Pty Ltd and Another **[2014] NNTTA 77 (30 July 2014)**

Application No: **WO2013/0885**

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

- and -

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

Kevin Cosmos, Robert Boona and Valerie Holborrow on behalf of the Yaburara & Mardudhunera Native Title Claim Group (WC1996/089) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Croydon Gold Pty Ltd (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 30 July 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 involve major disturbance to land or waters - expedited procedure attracted

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

Cases:	*Dann v Western Australia and Another* (1997) 74 FCR 391; [1997] FCA 332 (‘*Dann v Western Australia*’)
	Little v Oriole Resources Pty Ltd (2005) 146 FLR 576; [2005] FCAFC 243 (‘*Little v Oriole Resources*’)
	Smith v Western Australia (2001) 108 FCR 442; [2001] FCA 19 (‘*Smith v Western Australia*’)
	Tullock and Others v Bushwin Pty Ltd and Another (2011) 257 FLR 320; [2011] NNTTA 22 (‘*Tullock v Bushwin*’)
	Ward and Others v Western Australia and Another (1996) 69 FCR 208; (1996) 136 ALR 557; [1996] FCA 1452 (‘*Ward v Western Australia*’)
	Western Australia v Thomas (1996) 133 FLR 124; [1996] NNTTA 30 (‘*Western Australia v Thomas*’)
	Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd and Another [2014] NNTTA 8 (‘*Yindjibarndi Aboriginal Corporation v FMG Pilbara’*)
Representative of the native title party:	Ms Shirley Feng, Corser & Corser Lawyers
Representatives of the Government party:	Ms Jane Godfrey and Mr Matthew Pudovskis, State Solicitor’s Office
	Mr Matthew Smith, Department of Mines and Petroleum
Representatives of the grantee party:	Mr Greg Abbott, M & M Walter Consulting

REASONS FOR DETERMINATION

[1] On 8 May 2013, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E47/2460 ('the proposed licence') to Croydon Gold Pty Ltd ('the grantee party') under the *Mining Act 1978* (WA) ('Mining Act'). 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] According to the notice, the proposed licence comprises an area of 200 graticular blocks (approximately 639.1 square kilometres) located 51 kilometres south of Dampier, in the Shire of Roebourne. The proposed licence is 6.52 per cent overlapped by the Ngarluma/Yindjinbarndi native title determination (WCD2005/001 – determined on 2 May 2005) and 93.48 per cent overlapped by the Yaburara & Mardudhunera people's native title claim (WC1996/089 – registered from 1 August 1996).

[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). As explained by ss 32(3) and s 30(1)(a) and (b), the objection may be made by either: 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 3 months after the notification day, or (ii) if the RNTBC is registered after that three month period, the RNTBC has resulted from a claim that was registered before the end of three months from the notification day; or b) any registered native title claimant in respect of the relevant land or waters who is registered at four months from the notification day provided the claim was filed before the end of three months from the notification day.

[4] The notification date for this matter was 8 May 2013. The three month period for lodgement of objections was 8 August 2013 and the four month period for lodgement of objections was 8 September 2013. By the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the closing date for the four month lodgement became 9 September 2013, the next working day.

[5] Neither the Ngarluma Aboriginal Corporation nor the Yindjibarndi Aboriginal Corporation (the prescribed body corporate entities that hold the determined native

title rights and interests on trust on behalf of the Ngarluma and Yindjibarndi peoples) lodged an objection to the proposed licence.

[6] On 21 August 2013, Kevin Cosmos and other people listed as the registered native title claimants for the Yaburara & Mardudhunera claim made an application to the Tribunal objecting to the inclusion of the expedited procedure statement, and will be referred to as the 'native title party' for the purposes of this inquiry.

[7] I was appointed by President Raelene Webb QC to constitute the Tribunal for the purpose of conducting an inquiry into the objection on 24 October 2013.

[8] On 21 May, the Tribunal emailed all parties a copy of a map prepared by the Tribunal's Geospatial Services Unit, together with a copy of a search of the Department of Aboriginal Affairs (DAA) Heritage Inquiry System showing a list of Other Heritage Places. Parties were notified that the Tribunal intended to rely upon those documents and there were no objections to that course of action.

Background

[9] At the preliminary conference held on 1 October 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 5 February 2014, the grantee party requested that the matter proceed to inquiry and I set directions accordingly that day.

[10] In compliance with the directions, parties provided submissions and evidence as follows: the Government party's initial evidence on 23 February 2014 through the Department of Mines and Petroleum ('DMP'); the native title party contentions on 24 March 2014; the grantee party's contentions on 7 April 2014; and the Government party's contentions on 22 April 2014.

[11] In lieu of a listing hearing, on 8 May 2014 the Tribunal contacted each party by email to ascertain the parties' views on whether the Tribunal could dispense with a formal hearing and proceed 'on the papers'. By 9 May 2014, each of the parties had confirmed via email that they agreed the matter could proceed to be heard on the papers.

[12] I have considered the materials before me in this matter and am satisfied it is appropriate to proceed on the papers in accordance with s 151(2) of the Act.

Legal principles

[13] 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.

[14] In relation to the legal principles to be applied in this matter, I adopt those outlined by President Webb in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (at [15]-[21]).

Evidence in relation to the proposed act

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

- a Tengraph plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity of the proposed licence;
- reports and plans from the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs ('DAA Database');
- a copy of the proposed licence application;
- a Draft Tenement Endorsements and Conditions Extract; and
- a Tengraph quick appraisal detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features within the proposed licence.

[16] The Tengraph Quick Appraisal establishes the underlying land tenure within the proposed licence to be as follows:

- pastoral leases 3114/464 (Karratha) and 3114/1027 (Mardie) overlapping the proposed license by 13 per cent and 11.1 per cent respectively;
- pastoral lease I 3114/716 (Indigenous Held) (Mt Welcome) overlapping the proposed licence by 6.5 per cent;
- historical lease 394/438 overlapping the proposed licence by 6.5 per cent; and
- vacant Crown land overlapping the proposed licence by 69.3 per cent.

[17] The Quick Appraisal shows that the proposed licence area overlaps one live exploration licence by 0.5 per cent.

[18] The quick appraisal shows that the proposed licence has previously been subject to the following mineral tenure:

- eight expired or surrendered exploration licences active between 1993 and 2007, overlapping the proposed licence between 0.1 and 29.5 per cent;
- one surrendered mining claim, active between 1972 and 1973, overlapping the proposed licence by 0.2 per cent; and
- two expired or cancelled temporary reserves, active between 1960 and 1977, overlapping the proposed licence between 10.9 and 45.5 per cent.

[19] The Quick Appraisal also outlines the following features within the proposed licence:

- two geodetic survey stations (SSM-Yarraloola 38 and SSM-Wilkie);
- four tracks;
- two fence lines;
- Mount Wilkie and Weelarra Hill;
- six major non-perennial watercourses (including the Yanyare River);
- 69 minor non-perennial watercourses (including Byong Creek, Brill Creek, Armstrong Creek and Moondle Creek); and

- two springs/soaks/rockholes/waterholes (Byong Pool and Sometimes Pool).

[20] The report and plan from the Aboriginal Heritage Inquiry System maintained by the DAA pursuant to the *Aboriginal Heritage Act 1972* (WA) ('AHA') indicates the following registered sites within the proposed licence area:

- Gala Ngalarnu (Site ID 11561) – closed access – no gender restrictions – mythological; and

- Walu (Site ID 7053) – open access – no gender restrictions – ceremonial, mythological.

[21] Directions requested the Government party to include details of registered sites and other heritage places under the AHA. The Government party had not included information regarding whether any 'other heritage places' are located within the proposed licence area. However, the Tribunal's map and its own search of the Aboriginal Heritage Inquiry System (as outlined at [8]), indicated the following 'other heritage places' are located within the proposed licence area:

- Leopold Hill (Site ID 11594) – stored data/not a site – no gender restrictions – ceremonial;

- Mount Wilkie (Site ID 11815) – lodged – no gender restrictions – artefacts/scatter;

- Maitland River (Site ID 18088) – stored data/not a site – no gender restrictions – ceremonial, historical, mythological;

- Yanyare River (Site ID 18089) – stored data/not a site – no gender restrictions – ceremonial, historical, mythological; and

- Munni Munni (Site ID 18992) – lodged – no gender restrictions – engraving.

[22] I note that from the Tribunal's mapping it appears that the part of the Maitland River 'other heritage place' that overlaps the proposed licence is within the Ngarluma/Yindjibarndi native title determination and so does not fall within the area of the native title party in this inquiry.

[23] Based on the Tengraph plan and maps produced by the Government party and the Tribunal, the Aboriginal community of Weymul appears to be approximately 12 km

from the north easterly corner of the proposed licence. However, I note that this community is wholly within the Ngarluma/Yindjibarndi native title determination.

[24] The Draft Endorsement and Conditions Extract 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 will also be imposed on the proposed licence:

5. The Licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs, water carting equipment or other mechanised equipment.

6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
   - The grant of the licence; or
   - Registration of a transfer introducing a new Licensee;

   advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.

7. No interference with Geodetic Survey Station SSM-YARRALOOLA and SSM-WILKIE and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

8. No activities being carried out within the proposed railway corridor (designated FNA 9016) that interfere with or restrict any rail route investigation activities being undertaken by the rail line proponent.

[25] The Government party also indicate they intend to impose Regional Standard Heritage Agreement (RSHA) Condition on the grant in the following terms:

> In respect of the area covered by the licence the Licencee, if so requested in writing by the Yaburara & Mardudhunera People, the applicants in Federal Court application no. WAD 127 of 1997 (WC96/89), such request being sent by pre-paid post to reach the Licencee's address, not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of the Yaburara & Mardudhunera People the Regional Standard Heritage Agreement endorsed by peak industry groups and the Yamatji Marlpa Aboriginal Corporation.

[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 [*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 within a defined waterway and within a lateral distance of:
   - 50 metres from the outer-most water dependent vegetation of any perennial waterway; and
   - 30 metres from the outer-most water dependent vegetation of any seasonal waterway.

In respect to Proclaimed Surface Water and Irrigation District Areas the following endorsements apply:

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

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

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

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

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

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

Native title party's statement of contentions

[27] The native title party submits the Tribunal should find that the expedited procedure does not apply, or that the proposed licence should only be granted on condition that surveys are conducted by the native title party before any exploration activity commences. I note that the Tribunal has no power, in the expedited procedure objection process, to determine that the proposed licence may only be granted subject to conditions.

[28] The native title party's contentions are summarised in the following three paragraphs.

[29] *Interference with Community or Social Activities (s 237(a))*

- Members of the claim group engage in traditional activities such as camping, hunting and fishing within the proposed licence area (at 6).

- Section 66 of the *Mining Act* entitles the grantee party to enter the land with such agents, employees, vehicles, machinery and equipment for the purpose of exploring for minerals in, on or under the land. It is highly likely the presence of such vehicles and machinery will scare off any wild animals such as kangaroos, goanna and wild turkey from the area, which would affect the native title party's ability to hunt in the proposed licence area (at 7).

[30] *Interference with Sites of Particular Significance (s 237 (b))*

- There are two registered Aboriginal sites within the proposed licence area, one of which is a ceremonial site (at 8).

- There are likely to be artefacts and scatterings left behind by the native title party's ancestors resulting from their historical occupation and observance of traditional ceremonies within the proposed licence area (at 9).

- Even though the grantee party is now on notice that significant sites exist within the proposed licence area, the exact location of these sites is unknown to them, meaning that the AHA will fail to protect them unless there is close liaison between the native title party and the grantee party through negotiation and agreement (at 10).

[31] *Major Disturbance to Land (s 237 (c))*

- There is a real risk of damage to the land and to items left behind by the native title party's ancestors if the grantee party is permitted to perform exploration activities within the proposed licence area without the land and waters being surveyed and monitored during ground disturbance (at 11).

- The grantee party has yet to provide any evidence as to their exploration intentions or the type of work that is likely to be conducted on the proposed licence area. In the absence of evidence to the contrary, the Tribunal may, therefore, assume that the grantee party will fully exercise the rights conferred by the proposed licence (at 12).

- The rights and activities conferred by the proposed licence under s 66 of the *Mining Act* include: digging pits, trenches and holes in the land; sinking bores and tunnels; excavating and removing land, earth, soil, rock and stone from the land; and taking water from the land. These activities are likely to result in the removal of and disturbance to traditional bush tucker, bush medicines and traditional items (at 13).

- In determining whether the proposed licence is likely to involve major disturbance to any land or waters concerned, the Tribunal should give weight to the local effect of the proposed licence and, in particular, its effect on the native title party. The disturbance will cause such consequences for people in the local area such as the native title party that it should be called a major disturbance (at 14).

- There is strong law requiring the Yaburara & Mardudhunera people to care for and protect places where their ancestors have lived, and particularly where they camped, carried out ceremonies, or where they were buried as the spirits of their ancestors live in these places (at 15).

- If these places are disturbed or damaged then the Yaburara & Mardudhunera people believe the disturbance of their ancestor's spirits will lead to misfortune, ill health and possibly death within their people's society (at 16).

[32] The native title party has not provided any material in support of its contentions and did not seek to call witnesses at an oral hearing.

Grantee party's statement of contentions

[33] The grantee party has relied on the State's contentions but also makes the following statements in support of its contention that the expedited procedure should apply to the proposed licence:

- The grantee party will not exclude any community activities on the proposed licence unless it is considered temporarily unsafe (at 1.1).

- Native title and mining tenements can co-exist (at 1.2).

- The grantee party will comply with the AHA, is aware of the penalties that can be imposed and will report any heritage sites identified (at 2.1).

- The grantee party is aware of the existence of the two registered sites within the proposed licence and will manage exploration to avoid interference with those sites (at 2.2).

- The grantee party has never been prosecuted in relation to breaches of the AHA (at 2.2).

- The exploration activities will not constitute major disturbance to land or waters or create rights whose exercise will be likely to involve major disturbance to land or waters (at 3.1).

- The grantee party will restore land immediately after carrying out its exploration programme and the land will be restored as close as possible to its condition prior to the exploration programme (at 3.2).

[34] I note that the statements referred to in the preceding paragraph were made by way of contentions provided by the grantee party's representative, and was not supported by any further information provided by, for example, an authorised officer of the company. Though I accept that the grantee party's intentions are relevant to evaluating the level of disturbance likely to result from the grant of the proposed licence, I note that the grantee party has not outlined its plans in relation to its exploration programme. I must assume that the grantee party will exercise the full suite of rights available under the *Mining Act* on grant of the proposed licence.

Government party's contentions and evidence

[35] The Government party contends, among other things, that the:

- proposed licence is for an initial term of five years and is renewable. The rights conferred by the proposed licence (if granted) are set out in section 66 of the *Mining Act* (at 13-14);

- grantee party has given some indication of its intentions regarding the protection of Aboriginal heritage and land rehabilitation following exploration. There is no

basis to conclude the grantee party will not act in accordance with its stated intentions (at 16-17);

- grantee party has offered to enter into a Regional Standard Heritage Agreement ('RSHA') with the native title party (at 18);

- Government party intends to impose the endorsements and conditions set out in the Draft Tenement Endorsement and Conditions Extract, as well as impose a condition requiring the grantee party to offer an RSHA to the native title party upon the native title party's written request, as outlined at [25] of this decision; and

- proposed licence can be forfeited for any breach of a statutory condition or condition imposed by the relevant Minister (at 20).

[36] The Government party contends that, in the absence of evidence to the contrary, the Tribunal must assume that a grantee party will not act in breach of the relevant statute law, regulations or conditions imposed upon them (at 23).

[37] In relation to the materials provided by the native title party, the Government party contends that the statements made in its contentions are not evidence but assertions unsupported by evidence, and should not be relied on by the Tribunal. Alternatively, the Government party contends that the statements are too general to be given any (or any significant) weight or otherwise to be relied on by the Tribunal (at 26).

Government party's contentions in relation to s 237(a)

[38] The Government party contends that the native title party has not provided sufficient evidence to establish that any of the community and social activities referred to in the native title party's contentions are carried out by the native title party on the proposed licence (at 43).

[39] To the extent the Tribunal does find community or social activities are carried out on the proposed licence, the Government party contends (at 44) that direct interference is unlikely to occur because:

- the grantee party has stated that it will not exclude any community activities upon the proposed licence unless it is temporarily unsafe, and while the activities of the

grantee party and the native title party intersect this does not mean that there is a real chance of substantial interference;

- the grantee party has indicated its willingness to enter into an RSHA type agreement with the native title party, which shows a willingness to consult with the native title party and avoid activities that are likely to interfere with its community and social activities;

- previous mineral exploration and the overlap of pastoral leases are likely to have already affected the exercise of community and social activities in the area;

- there are no Aboriginal communities within the proposed licence; and

- exploration activities are inherently capable of existing alongside hunting.

[40] I note that there is the Aboriginal community of Weymul approximately 12 km from the north easterly corner of the proposed licence, but that it is wholly within the Ngarluma/Yindjibarndi native title determination (see [23]). I also note that there is no assertion from the grantee party that it is willing to enter into an RSHA type agreement with the native title party. However, I acknowledge the RSHA condition which will be imposed on the grant of the proposed licence by the Government party.

Government Party's contentions in relation to s 237(b)

[41] The Government party acknowledges the existence of two registered Aboriginal sites within the proposed licence area, but contends that their registration under the AHA is not determinative of whether they are sites of particular significance within the meaning of s 237(b) (at 53). The Government contends that the native title party has failed to demonstrate the particular significance of the registered sites (at 54), and that the 'closed' notation in relation to the Gala Ngalarnu site refers to the file held at the DAA and not to the site itself (at 55). The native title party have not contested these assertions.

[42] In any event, the Government party contends (at 56) that interference is not likely because the:

- grantee party is aware of the existence of the registered sites and its legal obligations in respect of them, and has stated that it will manage its exploration activities to avoid interference with those sites;

- grantee party has offered to enter into a RSHA with the native title party, which indicates its willingness to consult with the native title party and avoid activities likely to interfere with the activities of the native title party;
- native title party has the opportunity of enforcing this expression of intention by invoking the RSHA Condition;
- grantee party has indicated its intention to abide by the AHA, and the AHA and its associated processes are likely to prevent interference with any area or site of particular significance; and
- Gala Ngalarnu site is predominantly outside the proposed licence and the Walu site is on the periphery of the proposed licence, so they should be easy for the grantee party to avoid.

[43] Again, I note no assertion by the grantee party that they are willing to consult with the native title party but acknowledge the RSHA conditions will be imposed by the Government party.

Government Party's contentions in relation to s 237(c)

[44] The Government party contends that s 237(c) is only enlivened where there is a significant, direct physical disturbance of land or waters. The Government party contends that the qualification 'major' should be given its ordinary meaning and be assessed objectively. While conceding that the perspectives of Aboriginal people are relevant, the Government party contends that 'major disturbance' is not a subjective notion entirely to be determined by the opinions of the native title party (at 62–64).

[45] In relation to the proposed licence, the Government party contends (at 65) that major disturbance is unlikely to occur for the following reasons:

- the exercise of rights conferred by the proposed licence will be regulated by the Government party's regulatory regimes with respect to mining, Aboriginal heritage and the environment;

- 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 the completion of exploration;

- the grantee party has stated that it will restore land immediately after its exploration programme as close as possible to its condition prior to the exploration taking place;

- portions of the proposed licence have been subject to prior mineral exploration activity. 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;

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

- the grantee party has offered to enter into a RSHA with the native title party, which would require the grantee party to notify the native title party of proposed on-ground works and consult with the native title party about surveys of the land prior to any ground-disturbing work taking place (Again, in respect of this contention, regarding the RSHA, I reiterate my statement at [40] of this decision).

Considering the Evidence in context of s 237 of the Act

[46] In relation to what information is provided to the Tribunal, parties have what Carr J described in *Ward v Western Australia* as 'an evidentiary choice' (at [26]). Justice Carr went on to say 'where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn when the administrative tribunal applies its commonsense approach to evidence...if this happens, it will not be because of the application of any evidential onus of proof, but by the application of the commonsense approach to evidence.'

[47] Expedited procedure inquiries are designed to be conducted in an informal, quick and economical manner (see s 109(1) of the Act). There is no onus of proof as such, but a commonsense approach to the evidence means that parties will produce evidence to support their contentions. This is particularly where the facts are peculiarly within their knowledge (such as how grantee party activities may impede or adversely affect the native title party by reference to the criteria in the limbs of s 237).

[48] If a party fails to provide relevant evidence on critical aspects of the Tribunal's inquiry, the Tribunal will proceed to make a determination based upon the information before it. In this matter, as noted below and further above, the native title party has not provided any evidence to support its contentions in this matter.

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

[49] 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]). The notion of direct interference involves an evaluative judgment that the future act is likely to be the proximate cause of the interference and must be substantial and not trivial in its impact on community or social activities (see *Smith v Western Australia* at [26]). The assessment is also contextual, taking into account other factors which may have already had an impact on a native title party's community or social activities (such as mining or pastoral activity) (see *Smith v Western Australia* at [27]).

[50] The native title party contends that members of the claim group engage in traditional activities such as camping, hunting and fishing within the proposed licence area, but has not provided any evidence in support of that contention. That being the case, there is nothing in the materials before me that would allow me to assess the likelihood of direct interference with the native title party's community and social activities. The native title party has given no explanation as to why evidence of this nature was not provided to the Tribunal, and I accept the Government party's submission that I should not give significant weight to the statements made in the native title party's contentions without supporting evidence.

[51] In the absence of evidence that community and social activities are carried on by the persons holding native title to the land and waters concerned, I find the proposed licence is not likely to result in interference of the kind contemplated in s 237(a).

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, of special or more than ordinary) significance to the native title party in accordance with their traditions.

[53] There are two registered sites and five 'other heritage places' within the proposed licence. The mere fact of registration is not conclusive evidence that an area or site is of particular significance according to the traditions of the native title holders (see *Western Australia v Thomas* at [174]). The native title party contends that the sites are 'significant' to the claim group but does not elaborate on why the sites are significant. It suggests that there are likely to be further sites and scatterings of artefacts in the proposed licence area due to its historical occupation by the native title party's ancestors and their observance of traditional ceremonies in the area. However, the native title party has not provided any specific evidence in support of that suggestion. The native title party has also not provided any evidence of the sites' significance nor sought to explain what distinguishes them as sites of particular significance to the Yaburara & Mardudhunera people.

[54] Evidence in the form of an affidavit or signed statement from a member of the native title party, and/or anthropological evidence, or similar such evidence, rather than contentions from the native title party representative only, are always of assistance to the Tribunal when making decisions in relation to the limbs of s 237 of the Act.

[55] As there is no evidence to establish the existence of areas or sites of particular significance, either within the proposed licence or the surrounding area, it is unnecessary for me to determine the likelihood of interference within the meaning of s 237(b). I do note there is no evidence to suggest that the grantee party will not comply with its obligations, and the native title party is entitled to seek further protection through an RSHA.

[56] On the basis of the material before me, I find the proposed licence is not likely to interfere with areas or sites of particular significance in accordance with the traditions of the native title holders.

Major disturbance to land or waters – s 237(c)

[57] The Tribunal is required 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, as well as taking into account the concerns of the native title party (see *Little v Oriole Resources* at [41]-[57]).

[58] The native title party contends there is strong law requiring members of the claim group to care for and protect places where their ancestors have lived, and particularly where they camped, carried out ceremonies or were buried. The native title party also contends that, according to the beliefs of the Yaburara & Mardudhunera people, the disturbance or destruction of these places will lead to misfortune, ill health and possible death within the group.

[59] The concerns of the local Aboriginal community, including matters such as community life, customs, traditions and cultural concerns, are relevant to evaluating whether there is likely to be major disturbance (see *Dann v Western Australia* at [395], [401] and [413]). In that regard, I accept that beliefs surrounding the consequences which may befall a particular community as a result of damage to certain places may be relevant to the consideration of major disturbance under s 237(c). However, in the present matter, while I appreciate the concerns as they have been expressed, there is no actual evidence to support the existence of these beliefs or the kinds of places to which those beliefs are said to attach.

[60] The grantee party has not outlined its proposed work programme so I can only assume that it will exercise its full suite of rights under the *Mining Act*. However, I also note the grantee party has stated it will restore the land immediately after carrying out its exploration programme. The Government party contends there is no basis to conclude the grantee party will not act in accordance with its stated intentions.

[61] Even if the grantee party were to fully exercise its rights under the proposed licence, I do not consider the grant of the proposed licence will result in major disturbance to the land or waters concerned. In reaching this conclusion, I have had regard to the following factors:

- The grantee party's activities will be subject to regulatory regimes with respect to mining, Aboriginal heritage and the environment. The proposed endorsements direct the grantee party's attention to the AHA and to environmental and water management legislation. There is no evidence that the grantee party is unlikely to comply with these regimes.

- The proposed conditions require the grantee party to rehabilitate all disturbances made to the surface of the land to the satisfaction of the Department of Mines and Petroleum's Environmental Officer, and prohibit certain ground disturbing activities unless written approval is obtained.

- There is no evidence that the proposed licence has any sensitive topographical, geological or environmental characteristics that might lead to the conclusion that exploration activities would result in major disturbance to land or waters.

[62] Taking account of these factors, I find 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

[63] The determination of the Tribunal is that the act, namely the grant of exploration licence E47/2460 to Croydon Gold Pty Ltd, is an act attracting the expedited procedure.

Helen Shurven
Member
30 July 2014