NATIONAL NATIVE TITLE TRIBUNAL

Ashwin and Others on behalf of the Wutha People v Breaker Resources NL and Another
[2014] NNTTA 63 (7 July 2014)

Application Nos: **WO2013/1128, WO2013/1129, WO2013/1130**

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

- and -

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

Raymond William Ashwin, June Rose Ashwin, Geoffrey Alfred Ashwin and Ralph Edward Ashwin on behalf of the Wutha People (WC1999/010) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Breaker Resources NL (grantee party)

DETERMINATION THAT THE ACTS ARE ACTS ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 7 July 2014

Catchwords: Native title – future acts – proposed grant of exploration licences – expedited procedure objection applications – whether acts likely to interfere directly with the carrying on of community or social activities – whether acts likely to interfere with sites of particular significance – whether acts likely to involve major disturbance to land or waters - expedited procedure attracted

Legislation: *Native Title Act 1993* (Cth), ss 29, 31, 32(3), 146, 148(b), 151, 237
Mining Act 1978 (WA) s 66
Aboriginal Heritage Act 1972 (WA)
Acts Interpretation Act 1901 (Cth) s 36(2)
Rights in Water and Irrigation Act 1914 (WA)

Cases:	*Ashwin and Others on behalf of the Wutha People v Peter Romeo Gianni and Another* [2014] NNTTA 23 (4 March 2014) ('*Ashwin v Gianni 2*')
	Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd [2011] NNTTA 22 ('*Tullock v Bushwin*')
	Little v Oriole Resources Pty Ltd (2005) 146 FLR 576; [2005] FCAFC 243 ('*Little v Oriole Resources*')
	Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon [2006] NNTTA 65 ('*Parker v Ammon*')
	Parker on behalf of the Martu Idja Banyjima People v State of Western Australia [2007] FCA 1027 ('*Parker v Western Australia*')
	Parker v State of Western Australia (2008) 167 FCR 340; [2008] FCAFC 23 ('*Parker v Western Australia No 2*')
	Raymond William Ashwin and Ors on behalf of the Wutha People/Western Australia/Cliffs Asia Pacific Iron Ore Pty Ltd [2013] NNTTA 122 ('*Ashwin v Cliffs Asia Pacific*')
	Raymond William Ashwin and Ors on behalf of the Wutha People/Western Australia/Doray Minerals Limited [2013] NNTTA 68 ('*Ashwin v Doray Minerals Limited*')
	Raymond William Ashwin and Ors on behalf of the Wutha People/Western Australia/Peter Romeo Gianni [2013] NNTTA 88 ('*Ashwin v Gianni 1*')
	Silver and Others v Northern Territory and Others (2002) 169 FLR 1; [2002] NNTTA 18 ('*Silver v Northern Territory*')
	Smith v Western Australia (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*')
	Walley v Western Australia (2002) 169 FLR 437; [2002] NNTTA 24 ('*Walley v Western Australia*')
Representative of the native title party:	Mr Paul Tolcon, Mony De Kerloy Barristers & Solicitors
Representatives of the Government party:	Mr Rod Wahl, State Solicitor's Office Mr Matthew Smith, Department of Mines and Petroleum
Representatives of the grantee party:	Ms Michelle Simson, Breaker Resources NL

REASONS FOR DETERMINATION

[1] On 17 July 2013, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licences E38/2852, E38/2854 and E38/2855 ('the proposed licences') to Breaker Resources NL ('the grantee party'). The notice includes a statement that the Government party considers the grants attract the expedited procedure (that is, that the proposed licences are acts that can be done without the normal negotiations required by s 31 of the Act).

[2] The s 29 notices state that if the proposed licences were to be granted, it would authorise the holder to explore for minerals for a term of five years from the date of grant. Any person who is a registered native title claimant in relation to any of the land or waters covered by the proposed licences within the period of four months after the notification day is a native title party who may, within that four month period, lodge an objection with the National Native Title Tribunal ('the Tribunal') against the inclusion of the expedited procedure statement in a s 29 notice (see s 32(3) of the Act). The notification day advised in the notice was 17 July 2013, with the four month period for objection closing on 17 November 2013. By the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth) the closing date for lodging an objection became 18 November 2013, the next working day.

[3] The proposed licences are overlapped by the registered claims of the Wutha People (WC1999/010 – registered from 15 June 1999) and Mantjintjarra Ngalia #2 (WC2006/006 – registered from 1 April 2009). All of the proposed licences are in the Shire of Laverton. E38/2852 and E38/2855 also fall within the Shire of Wiluna. The location, claim overlaps, and size of each proposed licence is outlined in the table below:

Proposed Licence	*Wutha People Claim Overlap*	*Mantjintjarra Ngalia #2 claim overlap*	*Approximate size of Proposed Licence (km^2)*	*Location*
E38/2852	100%	100%	61.03	114 km South East of Wiluna
E38/2854	100%	100%	60.86	99 km North West of Cosmo Newberry Mission
E38/2855	100%	100%	70.08	125km South East of Wiluna

[4] On 7 November 2013, the Wutha People ('the native title party') made expedited procedure objection applications to the Tribunal in relation to the proposed licences. On 15 November 2013, Mantjintjarra Ngalia #2 made expedited procedure objection applications to the Tribunal in relation to the proposed licences. The objections lodged by Mantjintjarra Ngalia #2 were withdrawn on 1 April 2014. As such, the Wutha People are the only native title party for the purposes of this determination.

Background

[5] The grantee party advised at the first preliminary conference held in relation to the matters on 17 December 2013 that its preference was for the matter to proceed to inquiry. Directions for the inquiry were set with a listing hearing scheduled for 20 March 2014.

[6] In compliance with these directions, the Government party's initial evidence was lodged on 3 February 2014 through the Department of Mines and Petroleum ('DMP'). The Wutha native title party's statement of contentions was received on 18 February 2014, one day after the due date. Member Shurven declined to dismiss the objection pursuant to s 148(b) of the Act as requested by the Government party. The submissions of the Wutha native title party were accepted and the directions were amended to allow the grantee and Government party an additional day to submit their contentions and evidence. In compliance with the amended directions, the grantee party contentions were lodged on 24 February 2014, and following a further amendment to directions, the Government party contentions were lodged on 5 March 2014.

[7] The native title party contentions expressed an intention to call witnesses to give oral evidence, and outlined the evidence to be given, if the matter were to be decided otherwise than 'on the papers' pursuant to s 151(2) of the Act.

[8] On 13 March 2014, the Tribunal emailed all parties:

> The matters...are now ready for inquiry and are scheduled for a Listing Hearing on Thursday 20 March 2014. The Tribunal notes that all parties have complied with the set directions.
>
> If all parties agree to the following points, this listing hearing can be vacated and the Tribunal will be in contact with you again once a determination is made:
>
> a) you agree that the matter may proceed to an inquiry before the Member on the papers (no further hearing will be scheduled) and
>
> b) you do not intend to make any further submissions.
>
> If any party has further requests or submissions to make the listing hearing may proceed

[9] On 13 March 2014, each of the parties confirmed via email that they agreed the matter could proceed to be heard on the papers. Specifically, the email from the native title party's legal representative advised 'The Native Title Party (Wutha) agrees to points a. and b.'.

[10] The native title party's statement of contentions appears to be based on a pro forma document submitted in previous expedited procedure inquiries involving the Wutha People, with the only noticeable differences being the tenement details. The circumstances of this matter, in terms of the native title party not providing evidence to support its contentions, are also very similar to a number of previous expedited procedure determinations involving the Wutha People made by the Tribunal. It appears that the native title party has developed a standard practice of stating in their contentions that they will provide oral evidence and then providing no further material, even when given the express opportunity to do so (see *Ashwin v Gianni 2, Ashwin v Doray Minerals Limited, Ashwin v Gianni 1, Ashwin v Cliffs Asia Pacific*).

[11] The Government party has included in its submissions (at 39) that in its view, the issues for determination in these proceedings can be adequately determined in the absence of the parties and do not require an oral hearing. Taking into account the principles outlined at [11]-[13] by Member O'Dea in the *Ashwin v Doray Minerals Limited* decision, and that all parties agreed they had no further submissions, I have decided to proceed with this matter on the papers. There was simply no support from the native title party that the issues cannot be adequately determined in the absence of the parties (as per s 151 of the Act).

[12] On 7 April 2014, a map produced by the Tribunal Geospatial services was sent to parties. The map showed registered sites and other heritage places under the Department of Aboriginal Affairs. The Government party suggested that should the Tribunal rely on this map, reliance should not be placed upon the existence of a site where no other information or evidence is available to the Tribunal or other parties in respect of that. I agree this is the proper approach to take.

Legal principles

[13] 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.

[14] In *Walley v Western Australia*, the Hon C J Sumner, Deputy President, considered the applicable legal principles (at [7]–[23]) and the nature of exploration and prospecting licences and conditions to be imposed, including the activities permitted by the licences and the limits placed on those activities (at [24]–[35]) and I adopt Deputy President Sumner's findings for the purposes of this inquiry (see s 146 of the Act).

[15] In relation to s 237(a), I adopt the legal principles identified in *Tullock v Bushwin* (at [10]-[16]).

[16] With respect to issues arising under s 237(b), I adopt the legal principles identified by the Tribunal in *Parker v Ammon* (at [31]–[38] and [40]-[41]), (see also *Parker v Western Australia*; *Parker v Western Australia No 2*). I also adopt those set out by Deputy President Sosso in *Silver v Northern Territory*.

[17] The task of the Tribunal in relation to s 237(c) is to undertake a predictive assessment as to the likelihood of major disturbance to land and waters on the basis that major disturbance should be determined by reference to what is likely to be done, rather than what could be done (see *Little v Oriole*, especially [41]-[57]).

Evidence in relation to the proposed act

[18] The Government party provided the following documents in relation to the proposed licences:

- Tengraph plans 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 applications;
- Draft Tenement Endorsements and Conditions Extracts; and
- Tengraph quick appraisals detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features within the proposed licences.

[19] The Tengraph quick appraisal establishes the underlying land tenure within the proposed licences to be as follows:

E38/2852

- Vacant Crown Land overlapping at 100 per cent.

E38/2854

- Vacant Crown Land overlapping at 87.1 per cent;
- Pastoral Lease 3114/1212 (Banjawarn) overlapping at 12.9 per cent.

E38/2855

- Vacant Crown Land overlapping at 100 per cent.

All of the proposed licences are designated as Groundwater Areas under the *Rights in Water and Irrigation Act* 1914 (WA), managed by Department of Water.

[20] The quick appraisal shows that the proposed licence areas have previously been subject to the following mineral tenure:

E38/2852

- Six exploration licences between 1993 and 2010, all now surrendered, overlapping the proposed licence between 6.7 per cent and 45 per cent.

E38/2854

- Six exploration licences between 1994 and 2009, all now surrendered, overlapping the proposed licence between 4.2 per cent and 83.3 per cent;

- One temporary reserve granted in 1968 and cancelled in 1973 overlapping the proposed licence at 100 per cent.

E38/2855

- Six exploration licences between 1994 and 2010, all now surrendered or expired, overlapping the proposed licence between 12.4 per cent and 60.5 per cent.

[21] The quick appraisal indicates E38/2852 contains one track; E28/2854 contains one fence line and E38/2855 contains two tracks.

[22] The report from the DAA Database shows there are no registered sites or other heritage places within E38/2852 and E38/2855. The DAA Database lists the following registered site and other heritage place in relation to E38/2854:

- Site ID 1574 – Registered Site – Closed Access – No Gender Restrictions – Mulga Queen 3 – Ceremonial, Man-Made Structure.

- Site ID 1199 – Open Access – No Gender Restrictions – Mt Mabel North – Man-Made Structure.

[23] Tribunal mapping shows these two areas (site 1574 and 1199) have a very small encroachment onto E38/2854.

[24] There do not appear to be any Aboriginal communities within the proposed licences or the surrounding areas.

[25] The Draft Tenement Endorsement and Conditions Extracts indicates that the proposed licences 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]) which 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.

In relation to E38/2854 the following two conditions also apply:

5. The Licencee 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:-
   - 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.

[26] 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 for all licences:

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.

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

3. The Licensee's attention is drawn to the provisions of the:
   - Water Conservation Act, 1976
   - Rights in Water and Irrigation Act, 1914
   - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
   - Country Areas Water Supply Act, 1947
   - Water Agencies (Powers) Act 1984
   - Water Resources Legislation Amendment Act 2007

4. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.
5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the DoWs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.

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

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

In respect to Waterways the following endorsement applies:

7. Advice shall be sought from the DoW if proposing any exploration within a defined waterway and within a lateral distance of:
    - 50 metres from the outer-most water dependent vegetation of any perennial waterway; and
    - 30 metres from the outer-most water dependent vegetation of any seasonal waterway.

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

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

Native title party's statement of contentions

[27] As stated above, the native title party's contentions appear to be based on a pro forma document submitted in previous expedited procedure matters before the Tribunal and are outlined in full in *Ashwin v Gianni 2* (at [26]-[32]). In this matter, the native title party also states, in relation to s 237(b):

- That without a Wutha Heritage Protection Agreement, there is no way of knowing if there are sites yet to be registered in the proposed licences which may be impacted by the grant (at 6(f)).
- There is a registered site on E38/2854 (at 6 (g)).
- There is a real risk registered and unregistered sites will be damaged without a Wutha Heritage Protection Survey being undertaken (at 6(i)).

[28] As with previous matters, the native title party has not provided any material in support of its contentions. I refer to my decision in *Ashwin v Gianni 2* where the native title party contentions are largely identical to this matter (at [26]-[32]), and adopt those paragraphs for the purpose of this matter rather than re-stating those identical contentions.

Grantee party statement of contentions and evidence

[29] The grantee party has submitted a statement of contentions which addresses heritage obligations, pastoral lease obligations and provides information on proposed activities. The contentions do not explicitly address each of those subsections of s 237, but the material is relevant to consideration of those subsections.

[30] In relation to heritage obligations, the grantee party contentions state the following:

- There are two registered native title claimants over the proposed licences, Wutha and Mantjintjara Ngalia #2 (at 5).
- A heritage agreement has been offered to Mantjintjarra Ngalia #2 and not Wutha as the grantee party has an existing 'proactive relationship' with Mantjintjarra Ngalia #2, including pre-existing agreements (at 8-9).
- The grantee party 'is cognisant of the requirement of the *Aboriginal Heritage Act 1972*, and its obligation 'not to disturb heritage sites, registered or otherwise' (at 7).
- The grantee party notes registered site ID 1574 is located on E38/2854 (at 6).

[31] The contentions draw attention to a 12.9 per cent overlap between E38/2854 and the Banjawarn pastoral lease (3114/1212). The grantee party outlines its pre-existing relationship with the pastoralist and notes the grantee party understands its obligations to notify the pastoralist of exploration activities.

[32] In relation to proposed activities to be undertaken on the proposed licences, the grantee party contentions state:

- The proposed licences have been subject to previous exploration activities including prospecting, geochemical sampling, heritage surveys and drilling (percussion, auger, aircore and diamond). The grantee party's fieldwork to date over the area includes aeromagnetic / radiometric survey and surface soil sampling;
- Exploration activities in the first year will include reconnaissance rock chip sampling, geological mapping and surface soil sampling, all of which are low impact activities. No clearing or rehabilitation will be required; and

- The next stage of exploration in identified prospective areas will take place in the second and subsequent years, and will consist of aircore or reverse circulation drilling.

Government party contentions and evidence

[33] The government party contends, among other things, that: the rights which will be conferred by the proposed licences (if granted) are set out in section 66 of the *Mining Act* (and include an extract); the exploration licenses are for an initial term of 5 years and are renewable (at 18-19).

[34] The Government party states it proposes to impose the endorsements and conditions set out in the Draft Tenement Endorsement and Conditions Extract (at 24) (and as noted above in [25]-[26] of this decision). The Government party indicated it will also place a further condition on the grant requiring the grantee party to execute a Regional Standard Heritage Agreement ('RSHA') with Wutha if so requested within 90 days of the grant of the proposed licences (at 27). This is an unusual step as generally the Government party only requires one RSHA to be signed where there are overlapping claims and objections, and the Government party states the grantee party has provided the wholly overlapping Mantjintjarra Ngalia #2 claim with an executed RSHA. The Government party sets out the general terms of heritage agreements in respect of notifying and consulting with the native title party in relation to proposed works (at 28–29).

[35] The Government party states, 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 30), and that the grantee party's submissions provide a 'firm basis' for concluding there is not likely to be interference with any of the limbs contemplated under s 237 of the Act (at 31).

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

[36] The Government party submits there is no evidence to support the native title party's assertions that community and social activities are carried out on the proposed licence area (at 59). The Government party also submits (at 61) there is not likely to be direct interference with such activities bearing in mind:

- the grantee party initial activities are low impact and do not require clearing or rehabilitation and will be conducted subject to any exclusion area arising from heritage surveys (at 61(a));

- the grantee party's assertion that portions of the proposed licences may be surrendered based on initial results (at 61(b));

- the grantee party has indicated its willingness (at 61(c)) to enter into a heritage agreement with Mantjintjarra Ngalia #2 (who also overlap the proposed licences);

- the area of the proposed licences have been subject to prior mineral exploration, and these activities have affected and continue to affect the extent to which community and social activities can be carried out in the relevant area (at 61(d));

- E38/2854 is covered 12.9 per cent by pastoral lease 3114/1212 (Banjawarn) and the native title party's carrying on of community and social activities has been subject to, or co-existent with, other lawful activity for a significant period of time (at 61(e));

- there are no Aboriginal communities within the area of the proposed licences (at 61(f));

- the activities the grantee party may carry out are unlikely to have any real disruptive effect upon hunting, gathering, extraction of flora, use of other resources, any religious, ceremonial and other activities, telling of stories and dreaming or continuation of oral traditions, 'particularly given the intentions of the grantee party to conduct those activities with cultural sensitivity...'. 'Although the activities of the parties may intersect...it is not apparent that the activities of the native title party will thereby be prevented or disrupted to any significant extent' (at 61(g));

- hunting and mineral exploration are, by their nature, inherently capable of coexistence and the Tribunal has, on numerous occasions, found that to be the case and determined that the grant of an exploration licence is not likely to interfere with hunting (at 61(h));

- it is difficult to envisage how mineral exploration activity could cause substantive interference to the native title party's ability to access or travel across the area of the proposed licences (at 61(i)); and

- any holding of law ceremonies by the native title party will only intersect with exploration activities during a limited period. The grantee party's evidence of its intention to comply with legal obligations in relation to cultural issues means it is unlikely to conduct operations in a way which would interfere with any ceremonies (at 61(j)).

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

[37] The Government party highlights that the native title party has not produced any evidence regarding sites or areas of particular significance (at 67) or 'the manner in which they might be interfered with by the grantee party's activities' (at 74). It contends the Tribunal can have regard to the attitude of the grantee party in relation to entering into a RSHA and 'other evidence of the grantee party directed toward Aboriginal heritage' (at 68).

[38] The Government party also states (at 75-78) that interference is not likely because:

- the grantee party has a proactive relationship with native title parties, evidenced by its willingness to enter into a heritage agreement over the proposed licences and its offer of an RSHA to the wholly overlapping Mantjintjarra Ngalia #2 claim (at 75(a));

- the grantee party is aware of the possible existence of unregistered sites on the proposed licences and understands its obligations under the *Aboriginal Heritage Act* (at 75(b));

- initial exploration activities of the grantee party will be low impact with no clearing or rehabilitation required and conducted subject to any exclusions arising from heritage surveys (at 75(c) and (d)). Access during the initial exploration stage will be by existing roads and tracks (at 75(e));

- the proposed licences have been subject to previous mineral exploration activity with the proposed activities of the grantee being the same 'or no more significant than these previous activities' (at 76); and

- the 'AHA and its associated processes are likely to prevent any interference' with areas or sites of particular significance, and the grantee party has 'indicated its intention of abiding by the AHA' (at 77-78).

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

[39] The Government party states this limb of s 237 is only attracted when there is a significant, direct physical disturbance of land or waters, and that the grant of the proposed licence is not likely to involve such because:

- the State's regulatory regimes with respect to mining, Aboriginal heritage and the environment will likely avoid any such major disturbance (at 87(a));
- the grantee party's assertion that portions of the proposed licences may be surrendered based on initial results at (87(c));
- the grantee party's initial exploration activities are low impact and require no clearing or rehabilitation (at 87(b)). Any drill holes required during the next stage of exploration will be completely rehabilitated (at 87(d));
- any unauthorised disturbance caused by the grantee party may be mitigated pursuant to proposed rehabilitation endorsements and conditions to be imposed on the grantee by the Government party (at 87(e));
- there has been previous mineral exploration on the proposed licences (at 87(f)); and
- there is an absence of any particular characteristics that would be likely to result in disturbance to land or waters from the activities of the grantee party (at 87(g)).

Considering the Evidence in context of s 237 of the Act

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

[40] The Tribunal is required to make a predictive assessment as to whether the grant of the proposed licences 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]).

[41] I accept the Government and grantee party's arguments that the native title party has not made out any likely interference with community or social activities. I also note the grantee party's outline of proposed activities and its consultation policies in this regard. As such, I conclude it is unlikely that the grantee party's activities will interfere with the community or social activities of the native title party for the purposes of s 237(a).

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

[42] 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.

[43] I accept the Government party's argument that the native title party has not provided evidence to suggest there are sites or areas of particular significance on the proposed licence. I note there is one registered site and one other heritage place on E38/2854, but the native title party has not provided any evidence distinguishing these (or any other areas) as areas or sites of particular significance. I accept the State's regulatory regime in this matter is sufficient to protect such sites given: the previous mineral exploration activity over the area; the grantee party's contentions, and documents in support of the grantee party's approach, including its executed RSHA with the overlapping Mantjintjarra Ngalia #2 claim. I also note the Government party will place an RSHA condition on grant in favour of the Wutha native title claim. As such I conclude there is not likely to be a real chance or risk of interference with sites or areas of particular significance in this matter.

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

[44] 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* at [41]-[57]).

[45] I agree with the Government party that the native title party has not made out any particular features or aspects on the proposed licences in this matter, and 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 a real risk of major disturbance to land or waters on the proposed licences, based on the available evidence.

Determination

[46] The determination of the Tribunal is that the acts, namely the grant of exploration licences E38/2852, E38/2854 and E38/2855 to Breakaway Resources NL, are acts attracting the expedited procedure.

Helen Shurven
Member
7 July 2014