

**NATIONAL NATIVE TITLE TRIBUNAL**

*Walalakoo Aboriginal Corporation RNTBC v Brockman Exploration Pty Ltd and Another*  
[2014] NNTTA 109 (10 November 2014)

**Application No:** WO2013/0948

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

- and -

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

**Walalakoo Aboriginal Corporation RNTBC (native title party)**

- and -

**Brockman Exploration Pty Ltd (grantee party)**

- and -

**The State of Western Australia (Government party)**

**DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE**

**Tribunal:** Helen Shurven, Member  
**Place:** Perth  
**Date:** 10 November 2014

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

**Legislation:** [Native Title Act 1993 \(Cth\)](#), ss [29](#), [30](#)(1), [31](#), [32](#)(3), [151](#)(2), [237](#)  
[Aboriginal Heritage Act 1972 \(WA\)](#)  
[Mining Act 1978 \(WA\)](#), s [66](#)  
[Mining Regulations 1981 \(WA\)](#), reg [20](#)  
[Petroleum and Geothermal Energy Resources Act 1967 \(WA\)](#)  
[Acts Interpretation Act 1901 \(Cth\)](#), s [36](#)(2)

**Cases:** *Backreef Oil Pty Ltd and Oil Basins Ltd/JW (name withheld) and Ors on behalf of Nyikina and Mangala/Western Australia* [\[2013\] NNTTA 9](#) ('*Backreef Oil v Watson*')

*John Watson and Ors on behalf of Nyikina Mangala/Western Australia/Brockman Exploration Pty Ltd* [\[2013\] NNTTA 35](#) ('*Watson v Brockman Exploration*')

*Josephine Forrest & Ors on behalf of Yi-Martuwarra Ngurrara; Butcher Wise & Ors on behalf of the Kurungal Native Title Claimants; Gooniyandi Aboriginal Corporation/Western Australia/Brockman Exploration Pty Ltd* [\[2013\] NNTTA 100](#) ('*Forrest v Brockman Exploration*')

*Little v Oriole Resources Pty Ltd* (2005) 146 FCR 576; [\[2005\] FCAFC 243](#) ('*Little v Oriole Resources*')

*Maggie John and Ors on behalf of the Malarngowem People/Western Australia/Geological Resources Pty Ltd; and Jack Britten and Ors on behalf of the Purnululu People/Western Australia/Geological Resources Pty Ltd* [\[2013\] NNTTA 151](#) ('*John v Geological Resources*')

*Silver v Northern Territory* (2002) 169 FLR 1; [\[2002\] NNNTA 18](#) ('*Silver v Northern Territory*')

*Tulloch v Western Australia* (2011) 257 FLR 320; [\[2011\] NNTTA 22](#) ('*Tulloch v Western Australia*')

*Watson on behalf of the Nyikina Mangala People v Western Australia (No 6)* [\[2014\] FCA 545](#) ('*Watson v Western Australia*')

*Western Australia v Thomas* (1996) 133 FLR 124; [\[1996\] NNTTA 30](#) ('*Western Australia v Thomas*')

*WF (Deceased) & Others on behalf of the Wiluna Native Title Claimants/Western Australia/Kingx Pty Ltd* [\[2011\] NNTTA 170](#) ('*WF v Kingx*')

*Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd* [\[2014\] NNTTA 8](#) ('*Yindjibarndi v FMG Pilbara*')

<b>Representatives of the native title party</b>	Ms Barbra Friedewald, Kimberley Land Council Ms Angela Booth, Kimberley Land Council
<b>Representative of the grantee party</b>	Ms Lydia Brisbout, McMahon Mining Title Services Pty Ltd
<b>Representatives of the Government party</b>	Ms Caitlin Brandstater, State Solicitor's Office Ms Bethany Conway, Department of Mines and Petroleum

## REASONS FOR DETERMINATION

- [1] On 29 July 2013, the Government party, through the Department of Mines and Petroleum ('DMP'), gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E04/2320 ('the proposed licence') to Brockman Exploration Pty Ltd ('the grantee party'). The Government party included in the notice a statement that it considered the grant to be a future act that attracts the expedited procedure (that is, an act that can be done without the normal negotiations required by s 31 of the Act). In accordance with s 29(4)(a) of the Act, the notice specified the 'notification day' as 31 July 2013.
- [2] According to the notice, the proposed licence comprises 16 graticular blocks located 113 kilometres west of Fitzroy Crossing in the Shire of Derby-West Kimberley. The notice states that the grant of an exploration licence authorises the applicant to explore for minerals for a term of five years from the date of the grant.
- [3] An objection to the inclusion of the expedited procedure statement may be made to the National Native Title Tribunal ('the Tribunal') within four months of the notification day (see s 32(3) of the Act). Pursuant to s 32(3) and s 30(1)(a) and (b), the objection may be made by 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. The notice advised that the three month closing date was 31 October 2013 and the four month closing date was 30 November 2013. By the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the four month closing date for lodgement became 2 December 2013, the next working day.
- [4] At the date of notification, the proposed licence fell entirely within the boundaries of the Nyikina Mangala native title claim (WC1999/025 – registered from 28 September 1999). On 3 September 2013, the persons comprising the applicant in the Nyikina Mangala claim lodged an application with the Tribunal objecting to the assertion of the expedited procedure in respect of proposed licence. A determination of native title was subsequently made in the Nyikina Mangala claim by Gilmour J in the Federal Court on 29 May 2014 (see *Watson v Western Australia*) and, as a result of that determination, the rights and interests of the native title holders are now held in trust

by the Walalakoo Aboriginal Corporation RNTBC ('the native title party'). It was determined that native title rights and interests existed in the area covered by the proposed licence, and that those rights and interests are non-exclusive.

- [5] At a preliminary conference held on 17 December 2013, a representative of the grantee party indicated that the proposed licence was part of a project which was in the process of being sold and requested an adjournment to allow for the completion of the sale. On 17 February 2014, the representative informed the Tribunal and the other parties that the proposed licence had been sold as part of its Canning Basin project to 142 East Pty Ltd. There had also been a change in the grantee party's representation. At a status conference on 30 April 2014, the incoming grantee party representative indicated she did not have instructions. The matter was adjourned to another status conference on 28 May 2014, where the grantee party representative reported she still had no instructions, and directions were then issued for an inquiry into the objection.
- [6] In compliance with the directions, the Department of Mines and Petroleum ('DMP') provided supporting documents on behalf of the Government party on 11 June 2014. On 9 July 2014, the native title party provided a statement of contentions accompanied by the affidavit of Mr John Russell Albert affirmed 14 June 2014 ('Albert Affidavit') and the affidavit of Ms Barbra Friedewald affirmed on 7 July 2014 ('Friedewald Affidavit'). The grantee party provided a statement of contentions on 23 July 2014 and the State Solicitor's Office provided the Government party's contentions on 6 August 2014.
- [7] A listing hearing was scheduled for 28 August 2014 but was vacated with the consent of the parties, who agreed to proceed 'on the papers' (that is, without a hearing) in accordance with s 151(2) of the Act. I am satisfied it is appropriate to proceed in that manner.
- [8] On 11 September 2014, the Tribunal provided parties with a copy of a map depicting the proposed licence and surrounding areas, produced by the Tribunal's Geospatial Unit to assist with the determination of the objection. No party objected to the Tribunal using the map for this purpose.

## Legal principles

[9] 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.

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

## Evidence in relation to the proposed act

[11] The Government party provided the following documents in relation 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.
- A report and plan from the Aboriginal Sites Database ('DAA Database') maintained by the Department of Aboriginal Affairs pursuant to the *Aboriginal Heritage Act 1972* (WA) ('AHA').
- A copy of the proposed licence application.
- A draft Tenement Endorsements and Conditions Extract.
- A Tengraph quick appraisal detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features.

- [12] The Tengraph quick appraisal indicates that the proposed licence covers an area of 5,196.38 hectares, the underlying tenure of which is as follows:
- Pastoral leases 3114/757 (Kalyeeda) and 3114/571 (Nerrima) overlapping at 6.4 percent and 93.6 percent respectively.
  - Historical lease 396/428 overlapping at 94.7 per cent.
- [13] The quick appraisal also notes that the proposed licence is situated in a proclaimed Surface Water Area (Fitzroy River and Tributaries) and a proclaimed Ground Water Area (Canning-Kimberley), and that 3.2 percent of the proposed licence area is covered by the Camballin Irrigation District. The area is also subject to the National Heritage Listing for the West Kimberley region.
- [14] The quick appraisal indicates that, as of 11 June 2014, the proposed licence was subject to two live exploration licences granted in 2005 and which, taken together, covered the entire area of the proposed licence. The quick appraisal also indicates that the area is subject to an exploration permit granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA). The proposed licence has previously been subject to three mineral claims granted in 1979 and overlapping between 0.2 and 2.3 per cent, having an average lifespan of nine months; one prospecting area granted in 1971 and expired in 1972, overlapping at 21.2 per cent; and three temporary reserves granted in 1920, 1966 and 1973 respectively with an average lifespan of one year and nine months, the first two of which covered the entire area and the last covering five percent of the area.
- [15] The quick appraisal indicates the following features within the proposed licence area: one geodetic survey station (SSM-NK 26); three tracks; three fence lines; two non-perennial lakes; two major non-perennial watercourses; nine minor non-perennial watercourses and three springs/soaks/rockholes/waterholes.
- [16] The report from the DAA Database establishes there are two ‘other heritage places’ within the proposed licence area:
- Site ID 13566 (Nerrima Outcamp – lodged).
  - Site ID 13576 (Fitzroy River: Pool – lodged).

[17] There are no Aboriginal communities within the proposed licence. Tribunal mapping indicates that the Looma and Jarlmadangah communities are approximately 70 kilometres north-west from the proposed licence, while the Koorabye and Yungngora (Noonkanbah) communities are approximately 30 kilometres south east from the area.

[18] The draft Endorsement and Conditions Extract for the proposed licence indicates that the grant will be subject to the standard four conditions imposed on the grant of all exploration licences in Western Australia (see *Tulloch v Western Australia* at [11]). 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 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-NK 26 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

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

1. The Licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any related Regulations thereunder.
2. The Licensee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.

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

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

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

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

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

**In respect to Waterways the following endorsement applies:**

7. Advice shall be sought from the DoW if proposing any 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 Surface Water (Fitzroy River and Tributaries) and Irrigation District Areas (ID/9 Camballin) the following endorsements apply:**

8. The abstraction of groundwater 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 the 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 (Canning-Kimberley) 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 the DoW.

**Native title party contentions and evidence**

[20] The native title party contends that the grant of the proposed licence is an act that is likely to interfere directly with the carrying on of the native title party's community or social activities and interfere with areas or sites of significance to the native title party. The native title party does not make any specific contentions on the issue of whether the proposed licence is likely to involve major disturbance to the land and waters concerned.



- [21] In support of these contentions, the native title party relies on the affidavits of Mr Albert and Ms Friedewald.
- [22] Mr Albert states that he has authority to speak about Nyikina Mangala land matters and was identified by senior Nyikina Mangala people as the right person to make an affidavit about some of the community and social activities which take place on the proposed licence area (Albert Affidavit, paragraph 5). I accept that Mr Albert is authorised to speak on behalf of the native title party in this matter.
- [23] Mr Albert states and Tribunal mapping confirms that the proposed licence area is on the southern side of the Fitzroy River and is close to the communities of Koorabye and Looma (Albert Affidavit, paragraph 7). Mr Albert also states there are people who live out at Nerrima, which Tribunal mapping indicates is approximately 15 kilometres south-west of the proposed licence area. Mr Albert resides at Jarlmadangah, which he says is ‘about an hour drive’ from the proposed licence area (Albert Affidavit, paragraph 8). Mr Albert outlines activities associated with a planned camp and walk through the proposed licence area, which was planned to commence in July 2014 in collaboration with the ‘Yiriman Project’. The camp and walk was to involve young people, elders and coordinators participating in hunting, camping and teaching about Nyikina Mangala country and culture. Mr Albert also describes the area as a place he goes hunting and states that other community activities which take place in the area include caring for country activities carried on by rangers (Albert Affidavit, paragraphs 11-13, 16-26).
- [24] Ms Friedewald is a lawyer engaged by the Kimberley Land Council (‘KLC’). Ms Friedewald deposes that the KLC has no record of receiving any feedback from the grantee party on the heritage protection agreement offered by the native title party (Friedewald Affidavit, paragraph 2). Ms Friedewald deposes that the grantee party has at no time entered into dialogue or correspondence with the KLC with a view to establishing a heritage protection regime and states there is nothing she is aware of to suggest that such dialogue or correspondence would transpire after grant (Friedewald Affidavit, paragraph 3). Ms Friedewald states that the grantee party has not provided the native title party with any detail about its proposed or planned exploration activities (Friedewald Affidavit, paragraph 4).

[25] Ms Friedewald also outlines the size and location of the nearby communities, by reference to data obtained from the Australian Bureau of Statistics, which is annexed to Ms Friedewald's affidavit. Relevantly, Ms Friedewald states that the Looma community is less than 70 kilometres from the proposed licence area and has a population of approximately 375 people; Koorabye is less than 30 kilometres from the proposed licence area; Jarlmadangah is less than 90 kilometres from the proposed licence and has an approximate population of 72 people; and Yungngora is less than 30 kilometres from the proposed licence area and has a population of approximately 256 people (Friedewald Affidavit, paragraph 7). Also annexed to Ms Friedewald's affidavit is a notice from the Commonwealth Gazette regarding the inclusion of the West Kimberley in the National Heritage List and an extract from the Australian Heritage Database, which Ms Friedewald describes as the product of her preliminary research into the Fitzroy River heritage listing (Friedewald Affidavit, paragraph 5).

#### **Grantee party contentions and evidence**

[26] The grantee party's statement of contentions responds to the contentions and evidence provided by the native title party and outlines the grantee party's attitude to heritage protection and the nature of its exploration program.

[27] In relation to heritage, the grantee party states that it is willing to enter into a regional standard heritage agreement ('RSHA') with the native title party with respect to the proposed licence (GP Contentions, paragraph 10). The grantee party submits that this offer adequately ensures its compliance with existing law and policy and demonstrates its willingness to take on additional obligations and meet the concerns of the native title party in respect of site protection (GP Contentions, paragraphs 16 and 18). The grantee party also notes that it has never been prosecuted or accused of breaching the AHA (GP Contentions, paragraph 16).

[28] In relation to the proposed exploration activity, the grantee party states that it plans 'to undertake the usual activities associated with exploration licenses' and that these are 'low level and temporary' (GP Contentions, paragraph 33-34). This includes field reconnaissance, geological mapping, surface geophysics, potential broad spaced exploration drilling, collection of samples for core assays, soil sampling and surveys.

The grantee party states that ground-disturbing work will be ‘broad based’ and fully rehabilitated (GP Contentions, paragraph 33).

- [29] The grantee party details the evidence provided by the native title party, and suggests that given the community activity of the walk appears to be an annual event, the activities of the grantee party and the native title party are unlikely to coincide. The grantee party accepts that the hunting may be better on the south side of Fitzroy River, however, point out that there is an extensive area outside of the proposed licence, also on the south side of the Fitzroy River. The grantee party outlines that the native title party claim area is approximately 2,611,990 hectares in size, the proposed licence covers 5,196 hectares, and a large portion of the Fitzroy River is within the claim area, ‘ensuring that group has access to a large section of the river for their activities’ (GP Contentions, paragraphs 36-37).
- [30] In relation to the extract provided by the native title party from the Commonwealth Gazette, the grantee party highlights that the extract relates to an area of approximately 19,200,00 hectares in the West Kimberley (GP Contentions, paragraph 83), and so that evidence is not specifically isolated to the area of the proposed licence.

## **Considering the Evidence**

### **Community or social activities (s 237(a))**

#### *Contentions and evidence in relation to s 237(a)*

- [31] The native title party contends that the evidence establishes that members of the native title party hunt and camp in the proposed licence area; conduct intergenerational cultural teaching; collect bush tucker, medicine and other products; and care for country through structured ranger programs. The native title party submits that the evidence it has provided ‘deposes to the high probability that the Grant will interfere directly with the carrying on by the NTP of their community or social activities’ (NTP Contentions, paragraph 15).

- [32] Mr Albert states that, at the time of making his affidavit, he was coordinating a large camp in collaboration with Yiriman Project, which was going to include a walk through the proposed licence area from the Koorabye community. The camp and walk was planned to commence in July 2014 (Albert Affidavit, paragraph 11). Mr Albert states that he last visited the area in May 2014, when he went with others to scout the track for the camp. This involved travelling to the area by car from the community at Noonkanbah (Yungngora) and driving along the track that runs through the proposed licence area. Mr Albert recalls that the ‘stand out’ aspect of the country was the number of kangaroos and kangaroo tracks compared with the rest of the route (Albert Affidavit, paragraph 12). Mr Albert states that walks through the ‘back country’ (which includes the proposed licence area) occur annually and are planned to coincide with songlines and important cultural tracks (Albert Affidavit, paragraphs 18-19).
- [33] Mr Albert states that he used to visit the proposed licence area for hunting ‘very regularly’ and goes out there to hunt ‘[w]henever I get the chance.’ Mr Albert states he goes to the area rather than other places because the animals are ‘more abundant there.’ Mr Albert says there are more animals on south side of the Fitzroy River because there are no cars or roads and it is ‘more untouched’ (Albert Affidavit, paragraph 20). Mr Albert expresses concern that exploration activities such as drilling, rock chipping and road clearing will interfere with hunting because it will cause animals to leave the area, and may interfere with camping and teaching by restricting access to particular areas (Albert Affidavit, paragraph 27).
- [34] Mr Albert deposes that bush tucker and medicine can be found in the area, and says that participants on the camp will be taught ‘different aspects of culture and collection depending on what presents itself along the way’ (Albert Affidavit, paragraph 21). Mr Albert states that rangers also carry on caring for country activities in the proposed licence area, and recalls an expedition with rangers along the Fitzroy River including this area (Albert Affidavit, paragraph 26).
- [35] The Government party submits that a significant portion of Mr Albert’s evidence relates to activities associated with the camp and trips made in preparation for the camp which, in the absence of evidence indicating the ongoing nature of these activities, is irrelevant to the issue of interference (GVP Contentions, paragraphs 46-47). The Government party submits that the balance of Mr Albert’s evidence is

primarily directed to his personal activities or highly generalised statements about the use of the area, and the Tribunal should proceed cautiously in drawing inferences based upon his evidence (GVP Contentions, paragraph 48). In particular, the Government party contends that the Tribunal does not have sufficient evidence to infer how often or to what extent the identified activities are undertaken in the area, other than the camp and walk held in July 2014 (GVP Contentions, paragraph 48).

[36] Furthermore, the Government party contends there is not likely to be direct interference with the identified activities for the following reasons:

- (a) There are other interests, including pastoral and petroleum exploration interests, in the proposed licence area. The evidence suggests these other interests have had little or no effect on the native title party's ability to engage in the identified activities and the effect of the proposed licence is likely to be the same as, or no more significant than, the previous and continuing use of the area (GVP Contentions, paragraphs 54-57).
- (b) The grantee party has stated that most of the proposed exploration activities will be low-level and temporary in nature and any exploratory work will be broad based and fully rehabilitated. The grantee party's willingness to enter into an RSHA-type agreement indicates a willingness to consult with the native title party and is a relevant factor in determining the likelihood of interference with community and social activities (GVP Contentions, paragraph 59).
- (c) The activities planned by the grantee party are unlikely to interfere with the native title party's community and social activities in a significant way, considering:
  - (i) the intention of the grantee party to maintain good relations with the native title party (GVP Contentions, paragraph 60);
  - (ii) hunting and mineral exploration activity are, by their nature, inherently capable of coexistence (GVP Contentions, paragraph 61); and
  - (iii) an exploration licence does not carry a right to control access to land and the slight risk that the grantee party might physically be in the way of a

member of the native title party in relation to the small area of land where it is operating on a given day is not substantial enough to constitute interference in the s 237(a) sense (GVP Contentions, paragraph 62).

- (d) To the extent that the native title party conducts yearly walks through the proposed licence area, the activities of the grantee party and the native title party will only potentially intersect in the limited period during which a walk is held. Although it may be assumed, in the absence of any cooperation between the parties, that there may be a possibility that the grantee party could inadvertently approach near an area through which a walk or camp is being held, there is evidence that the grantee party intends to comply with its legal obligations and communicate with the native title party. The Government party states the Tribunal can infer from this evidence that, so long as the grantee party is made aware of the location and time of each year's walk or camp, it is not likely to conduct its operations in a way which interferes with the walk or its participants (GVP Contentions, paragraph 63).

[37] The grantee party contends that the activities described in the evidence of the native title party are able to co-exist with the rights proposed to be granted to the grantee party (GP Contentions, paragraph 29), and I note there is evidence that other exploration grants on the area have co-existed with these activities. The grantee party's submission notes that, in particular, if the planned walk commences at Koorabye, it is highly likely to pass over granted tenure surrounding the proposed licence area (GP Contentions, paragraph 31(g)). Furthermore, the grantee party submits that any interference is not likely to be substantial, as the camp and walk appears to be an annual event and there is no other evidence of camping or teaching activities conducted in the area (GP Contentions, paragraph 31(k)-(m)).

[38] In relation to hunting activities, the grantee party submits that the Fitzroy River and associated tributaries and floodplains cover a large area and there is extensive land to the south of the river which will remain available to the native title party for hunting and gathering activities (GP Contentions, paragraph 31(q)). In any event, the grantee party submits that no significant evidence has been presented as to why these hunting activities would not be able to co-exist with any exploration activities that may be undertaken by the grantee party (GP Contentions, paragraph 31(w)). The grantee party

also submits that it is likely these activities are able to be conducted more broadly within the area south of the Fitzroy River, and there is no evidence that any of these activities are only able to be conducted within the proposed licence area (GP Contentions, paragraph 31(y)).

- [39] In relation to caring for country activities, the grantee party submits that any work carried out by the grantee party is likely to be restricted to a small area and it is likely the activities of rangers will be able to be undertaken around any planned works or in other areas of the proposed licence or determination area (GP Contentions, paragraph 31(aa)).

*Consideration of s 237(a)*

- [40] Insofar as Mr Albert's evidence relates to activities associated with the planned camp and walk, I am not satisfied the exercise of the rights conferred by the proposed licence will directly interfere with these activities. I accept that these activities are community or social activities of the kind contemplated by s 237(a). However, to the extent that the evidence concerns the camp and walk planned for July 2014 and activities in preparation for the event, it appears the grant will not interfere with these activities.

- [41] As the grantee party has only provided very general information about the activities it intends to carry out on the proposed licence area, and as Ms Friedewald outlines in her evidence, no information has been provided to the native title party regarding the grantee party's proposed exploration program, I am entitled to presume it will exercise the rights conferred by the grant to their full extent (see *Silver v Northern Territory* at [25]-[32]). This includes rights to carry on such works as are necessary for the purpose of exploring for minerals, including digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for that purpose, and to excavate, extract or remove such land, earth, soil, rock, stone, fluid or mineral bearing substances up to the prescribed amount of 1,000 tonnes (see *Mining Act 1978 (WA)*, s 66; *Mining Regulations 1981 (WA)*, reg 20). It should be noted, however, that the exercise of those rights will be subject to conditions requiring the written approval of the DMP's Environmental Officer before mechanised equipment may be used to

disturb or excavate the land, and the rehabilitation of all disturbances to the surface of the land no later than six months after excavation unless otherwise approved.

[42] The native title party sought to argue on the basis of Mr Albert's evidence that camping occurs regularly in the proposed licence area and that the area is used generally for knowledge sharing and teaching (see NTP Contentions, paragraphs 19-20). While I appreciate the argument the native title party is making, it is not fully supported by the affidavit evidence provided. The only instances in which Mr Albert refers to these activities are in connection with the planned camp and walk. Although Mr Albert states that the walks occur every year, it is not clear whether the same route is taken. Nor is it clear how long the native title party may be within the proposed licence, either for the purposes of planning the activity or the actual doing of the activity.

[43] Even if the camp and walk were to take the same route in future years and the grantee party were to fully exercise its rights under the grant, I am not satisfied the activities of the grantee party would cause substantial interference with such activities. Though it is possible that members of the native title party could come across the grantee party while it is carrying out exploration works, it is unlikely such activities of the grantee party would substantially interfere with the ability of the native title holders to carry on the activities identified in Mr Albert's affidavit.

[44] The native title party refers to the comments of Deputy President Sumner in *Tullock v Western Australia* at [112], where he observed:

If a native title party regularly camps at a particular spot and the explorers wish to establish an exploration camp at the same place and drill or use earthmoving equipment in the near vicinity of it then it can be readily said that there is a real risk that the community or social activities would be directly interfere with.

[45] I accept there may be a risk of interference in the circumstances identified by Deputy President Sumner in *Tullock v Western Australia*. However, in the present case, the native title party has not identified any specific places where camping and teaching activities might be carried on as part of the walks. Mr Albert simply states that he will 'chose a flat open area away from the scrub' before they make camp (Albert Affidavit, paragraph 22). Though Mr Albert refers to bush tucker and other resources that can be found in the proposed licence, it is not apparent that these resources are



concentrated in particular parts of the proposed licence. Mr Albert states that the specific activities undertaken on the walk will depend on ‘what presents itself along the way.’ The native title party notes Mr Albert’s statement that walks are ‘planned to coincide with the songs which the old people know and therefore important cultural tracks’ (Albert Affidavit, paragraph 19). However, there is no evidence of any specific cultural tracks running through the proposed licence area. In this context and given the size of the proposed licence, I consider it unlikely the activities undertaken by the grantee party would have a significant effect on activities associated with the walks.

[46] It is arguable that any works undertaken by the grantee party might interfere with knowledge sharing and teaching activities if the works were to have a long-term effect on the environmental values of the area. Mr Albert’s evidence suggests the area was selected for the camp and walk due to the abundance of kangaroos, which provides an opportunity to teach about kangaroo hunting. Mr Albert states that the animals are more abundant in the proposed licence area and the area south of the Fitzroy River generally than other areas due to the absence of cars and roads and the fact it is ‘more untouched.’ In this context, Mr Albert outlines his concern that exploration could cause animals to leave the area.

[47] There is no evidence that exploration activity in the area will necessarily have the effects described. Although Mr Albert describes the area south of the Fitzroy River as untouched, I note that the proposed licence area and its surrounds have previously been subject to mineral exploration tenure and are currently subject to a live petroleum exploration permit. The area is also subject to existing pastoral leases. Though I acknowledge the existence of current and previous exploration licences does not necessarily imply that the rights conferred by the licences have been exercised, it is open for the Tribunal to infer that some exploration has occurred in these areas, particularly where that underlying tenure has existed over an extended period of time. At any rate, the activities undertaken by the grantee party are only likely to affect discrete areas at any given time and, in the circumstances, it is unlikely these activities will significantly affect the presence of animals in the proposed licence.

[48] The native title party contends the Tribunal has previously found interference is likely to occur where Aboriginal communities are located in close proximity to the area affected by the future act (NTP Contentions, paragraph 26). In particular, the native

title party refers to *John v Geological Resources* (at [42]), where I accepted that the proximity of an Aboriginal community meant that social and community activities were likely to be undertaken more frequently in the area affected by the future act compared with areas further away from the community. In that matter, the community in question was approximately five kilometres from the relevant area and in the present inquiry, the communities are between 30 and 90 kilometres away (with Jarlmadangah being approximately one hour drive according to Mr Albert's affidavit). In addition, the conclusion reached in *John v Geological Resources* was that interference was unlikely to occur because there was little evidence of the frequency and location of the native title party activities, and little indication of whether or not the activities could be done elsewhere in the claim area. In contrast, evidence presented in *Forrest v Brockman Exploration*, to which the native title party also refer, supported the conclusion that interference was likely to occur, as it not only established the existence of two communities which bordered the area affected by the future act, but also outlined in detail the activities carried on in the area by the members of those communities. However, in the present case, the closest communities are much further away from the proposed licence, and there is little evidence of the extent to which the area is actually used by members of these communities for hunting and other activities.

- [49] The native title party also refer to the Tribunal's finding in *WF v Kingx* (at [39]) that interference is more likely to occur where the area in question has unique qualities compared with other areas within the claim or determination area (NTP Contentions, paragraph 23). In this respect, the native title party draws attention to Mr Albert's statements regarding the 'untouched' quality of the area and the abundance of animals. Several observations may be made in this context. First, Mr Albert's comments about the nature of the country appear to relate to the general area south of the Fitzroy River rather than just the area affected by the proposed licence. Second, the areas identified in *WF v Kingx* included a permanent camp frequently visited by members of the claim group and a sacred men's area where ceremonial activities were still performed. Third, the evidence in *WF v Kingx* established a pattern of use which suggested that interference was likely to occur unless there were ongoing negotiations between the parties. In this matter, the evidence suggests that, even if the grant of the

proposed licence were to interfere with hunting in the area, members of the native title party would still be able to carry on these activities in surrounding areas.

[50] In relation to caring for country activities, there is little evidence as to what these activities actually involve or whether they are presently carried on in the proposed licence. In the circumstances, I am not satisfied the grant of the proposed licence is likely to interfere with these activities.

[51] Taking into account the evidence presented in this matter, and particularly that pastoral and other exploration interests exist in the area which do not appear to have interfered with the native title party activities, I find that the proposed licence is not likely to directly interfere with the community or social activities of the native title holders.

### **Sites of particular significance (s 237(b))**

#### *Contentions and evidence in relation to s 237(b)*

[52] The native title party contentions argue that, given the scope, location and special knowledge the native title party has of the proposed licence area, interference is likely to occur, notwithstanding the effect of the relevant regulatory regimes (NTP Contentions, paragraph 35).

[53] The native title party's contentions also argue the evidence establishes that members of the native title party consider the Fitzroy River and its associated waterways and tributaries as significant (NTP Contentions, paragraph 36). In support of this submission, the native title party relies on the notice and an attached schedule from the Commonwealth Gazette regarding the inclusion of the West Kimberley in the National Heritage List, and an extract from the Australian Heritage Database outlining the heritage values of the Fitzroy River. The native title party also refers to the two 'other heritage places' recorded on the DAA Database and submits that the Tribunal has previously acknowledged the probative value of these records in *John v Geological Resources* (NTP Contentions, paragraph 37).

- [54] It is convenient here to set out the relevant passages from the schedule to the notice in the Commonwealth Gazette which were provided by the native title party (emphasis in the original):

*Rainbow Serpent traditions tied to Indigenous interpretations of the different way [sic] in which water flows within the catchment*

The Rainbow Serpent is an important Creation Being for Aboriginal people across Australia and is closely linked to land, water, life, social relationships and fertility. There are many stories associated with the serpent, all of which communicate the significance and power of this Being within Aboriginal traditions.

Within the Fitzroy River catchment there are four distinct expressions of the Rainbow Serpent tradition. In the *jila-kalpurtu* domain of the Fitzroy catchment on the northern edge of the Great Sandy Desert, water flows are principally underground and the Rainbow Serpent (*kalpurtu*) is said to exist in the underground structure of the channels, linking excavated waterholes and other water sources of significance. Places like Kurrpurrngu, Mangunampi, Paliyarra and Kurungal are exemplars of this expression of the Rainbow Serpent.

The phenomenon of *Galaroo*, on the other hand, is linked to flowing surface water, in the form of major rivers, and to long and deep permanent waterholes in broad river channels, like Geikie Gorge (*Danggu*). The Rainbow Serpent of the Wanjina-Wunggurr belief system, known as Wunggurr, is typically found in discrete pools of water and is also associated with the sea and with Wanjina Creator Beings at painted sites and in religious narratives.. [sic] The upper Hann river is an exemplar of this aspect of the Rainbow Serpent tradition, while the Woonyoomboo-Yonngooroonkoo narrative of the lower Fitzroy primarily tells the story of the creation of the lower Fitzroy River and its floodplains and its links to the sea.

***The Fitzroy River and a number of its tributaries, together with their floodplains and the jila sites of Kurrpurrngu, Mangunampi, Paliyarra and Kurungal, demonstrate four distinct expressions of the Rainbow Serpent tradition associated with Indigenous interpretations of the different ways in which water flows within the catchment and area of outstanding heritage value to the nation under criterion (d) for their exceptional ability to convey the diversity of the Rainbow Serpent tradition within a single freshwater hydrological system*** (at 15).

- [55] The extract from the Australian Heritage Database notes that the Fitzroy River is ‘a central place in Nyikina cultural belief and spirituality.’
- [56] The Government party contends that (GVP Contentions, paragraph 73), while these documents are relevant, neither has the same probative value as affidavit evidence provided by a member of the native title party, and notes that both documents relate to a much larger area than the portion of the Fitzroy River that is subject to the proposed licence. Furthermore, the Government party contends that, while the documents establish the general importance of the area to the public at large, it does not answer the question of whether the Fitzroy River (or that part of the river within the proposed licence area) is a site of particular significance to the native title party (GVP Contentions, paragraph 74). In the Government party’s submission, no affidavit

evidence is provided by a member of the native title party as to how the river is significant to its members, and there is no specific evidence as to how the grant of the proposed licence will interfere with the river (GVP Contentions, paragraph 72). In relation to the other heritage places, the Government party contends there is no evidence of the particular significance of these sites, nor evidence of how the grant may interfere with them (GVP Contentions, paragraph 75).

- [57] The grantee party acknowledges there may be sites of particular significance in the proposed licence area which are not recorded on the DAA Database and, in recognition of this, the grantee party has offered to enter into an RSHA which provides for the conduct of heritage surveys if undertaking ground-disturbing activities (GP Contentions, paragraphs 52-54). However, the grantee party submits that the evidence of Mr Albert does not identify any sites of significance to the native title party and the documents annexed to the affidavit of Ms Friedewald relate to the broadly defined heritage values of the Fitzroy River and West Kimberley region, rather than the significance of specific features within the proposed licence area (GP Contentions, paragraphs 77, 82-85). In any event, the grantee party contends that the proposed licence does not actually encroach on the Fitzroy River itself, although some portions are located in close proximity to the river (GP Contentions, paragraph 55). Tribunal mapping suggests the Fitzroy River is to the north of the proposed licence.

*Consideration of s 237(b)*

- [58] There is no evidence that the ‘other heritage places’ of Nerrima Outcamp and Fitzroy River Pool are sites of particular significance to the native title party. As the Tribunal has previously noted, registration of a site under heritage legislation is not determinative of the particular significance of the site (see *Western Australia v Thomas* at 174). As there is no evidence identifying the significance of these places, I am not able to find that they are sites or areas of particular significance within the meaning of s 237(b). *John v Geological Resources* is not authority for the proposition that the existence of an ‘other heritage place’ is capable of supporting a finding that the place in question is an area or site of particular significance. Evidence is needed which outlines the site’s particular significance in accordance with the traditions of the native title party.

- [59] I accept that the Fitzroy River is central to Nyikina beliefs. This conclusion is consistent with my finding in *Backreef Oil v Watson* (at [81]), which I later adopted in *Watson v Brockman Exploration* (at [64]). As I observed in the latter decision, this finding does not necessarily lead to the conclusion that the river, or at least that part of it which passes through the relevant area, is a site or area of particular significance. That is a matter to be established by the evidence.
- [60] The documents relating to the National Heritage Listing are concerned with the importance of the Fitzroy River and the West Kimberley region in ‘demonstrating the principal characteristics’ of a ‘class of Australia’s natural and cultural places’ or environments. However, the inquiry under s 237(b) of the *Native Title Act* is concerned with the significance of particular areas and sites in accordance with the traditions of the native title party. Although the documents refer to the general significance of the Fitzroy River in Nyikina culture and other Indigenous traditions, they do not support the particular significance of any area or site within the proposed licence.
- [61] The native title party contends that the fact the river and floodplains have been targeted for caring for country ranger work supports the particular significance of these areas (NTP Contentions, paragraph 39). In my view, the evidence does not support this contention. As I noted above at [50], there is little evidence about caring for country activities being carried on in the proposed licence area. The evidence suggests these activities are conducted along the river, but this does not support the conclusion that the river or floodplains in or near the proposed licence are areas of particular significance.
- [62] As I have found that the evidence does not support the existence of any areas or sites of particular significance which might be affected by the grant of the proposed licence and the activities of the grantee party, it is unnecessary for me to consider whether there is likely to be interference of the kind referred to in s 237(b) of the Act.
- [63] In conclusion, I find that the grant of the proposed licence is not likely to interfere with areas or sites of particular significance to the native title holders for the purposes of s 237(b) of the Act.

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

[64] The native title party has made no specific contentions on the issue of major disturbance. Nonetheless, the original objection raised this limb of s 237 of the Act, and the Tribunal is required under s 237(c) to make an evaluative judgment of whether major disturbance to land and waters is likely to occur (in the sense that there is a real risk of it) from the point of view of the entire Australian community, including the Aboriginal community, taking into account the concerns of the native title party (see *Little v Oriole Resources* at [41]-[57]).

[65] The Government party contends the grant of the proposed licence is not likely to involve major disturbance for the following reasons:

- (a) The grantee party has stated that most of the proposed exploration activities will be low-impact and temporary. Any ground-disturbing activities are intended to be conducted in a way which will not adversely impact on heritage sites, and any areas the subject of ground-disturbing activities are intended to be rehabilitated.
- (b) The exercise of rights conferred by the proposed licence will be covered by the State's regulatory regime with respect to mining, Aboriginal heritage and the environment. By 'mining' I assume the Government party is referring to those activities broadly and inclusive of exploration, as will be done in the current matter. The Government party argues it is likely these regimes will together and separately avoid any major disturbance to land and waters.
- (c) Any authorised disturbance to land and waters caused by the grantee party will be mitigated by proposed conditions requiring rehabilitation of the land following completion of exploration.
- (d) The area is currently overlapped by a petroleum exploration permit, two live exploration permits and two pastoral leases. The activities contemplated by the grantee party in the proposed licence would be the same as, or no more significant than, the previous and continuing use of the area.

[66] I accept these reasons support the conclusion that the proposed licence is not likely to involve major disturbance to the land and waters concerned, though I note that the

Government party somewhat overstates the effect of the grantee party's contentions with respect to the scope of its exploration program.

[67] As noted above at [13], the proposed licence falls within the West Kimberley National Heritage Listing. The Tribunal has found on previous occasions that a National Heritage Listing is not determinative of whether major disturbance is likely to occur (see *Watson v Brockman Exploration* (at [75])). In the present matter, there is no evidence of any special topographical, geological or environmental factors that might lead members of the Australian community to believe that the proposed licence would result in major disturbance to the land and waters concerned.

[68] Based on the evidence before me, I find that the grant of the proposed licence is not likely to involve, or create rights whose exercise is likely to involve, major disturbance to the land and waters.

### **Determination**

[69] The determination of the Tribunal is that the act, namely the grant of exploration licence E04/2320 to Brockman Exploration Pty Ltd, is an act attracting the expedited procedure.

**Helen Shurven**  
**Member**  
**10 November 2014**