NATIONAL NATIVE TITLE TRIBUNAL

Leedham Papertalk and Others on behalf of Mullewa Wadjari v Colin David Gardiner and Laurie Dowding and Another **[2014] NNTTA 110 (19 November 2014)**

Application No: **WO2014/0039**

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

- and -

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

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

- and -

The State of Western Australia (Government party)

- and -

Colin David Gardiner and Laurie Dowding (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 19 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), ss 61(2), 66
Acts Interpretation Act 1901 (Cth), s 36

Cases: *Butcher Cherel and Others/Western Australia/Faustus Nominees Pty Ltd* [2007] NNTTA 15, (‘*Cherel v Faustas Nominees*’)

Cheinmora and Others v Heron Resources Ltd and Another (2005) 196 FLR 250 [2005] NNTTA 99, (‘*Cheinmora v Heron Resources*’)

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

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

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

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

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

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

Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd [2011] NNTTA 22, (‘*Tullock v Bushwin*’)

Little and Others v Oriole Resources Pty Ltd [2005] FCA 506, (‘*Little v Oriole Resources*’)

Maitland Parker and Others/Western Australia/Derek Noel Ammon [2006] NNTTA 65, (‘*Parker v Ammon*’)

Maitland Parker and Others /Western Australia/Iron Duyfken Pty Ltd [2010] NNTTA 60, (‘*Parker v Iron Duyfken*’)

Nicholas Cooke & Others on behalf of the Innawonga People/Western Australia/Dioro Exploration NL [2008] NNTTA 108 (‘*Cooke v Dioro Exploration*’)

Rosas v Northern Territory and Another (2002) 169 FLR 330; (2002) NNTTA 113, (‘*Rosas v Northern Territory*’)

Silver and Others v Northern Territory of Australia and Others (2002) 169 FLR 1; [2002] NNTTA 18, (‘*Silver v Northern Territory*’)

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

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

Representatives of the native title party	Ms Shirley Feng, Corser & Corser Lawyers Ms Lesleigh Bower, Corser & Corser Lawyers
Representatives of the Government party	Ms Caitlyn Rice, State Solicitor's Office Ms Bethany Conway, Department of Mines and Petroleum
Representative of the grantee party	Mr Matthew Clohessy, Emerald Tenement Services

REASONS FOR DETERMINATION

[1] On 9 October 2013, the Government party, through the Department of Mines and Petroleum ('DMP'), gave notice under s 29 of the *Native Title Act 1993* (Cth) ('NTA/the Act') of its intention to grant exploration licence E59/1991 ('the proposed licence') to Colin David Gardiner and Laurie Dowding ('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).

[2] According to the notice, the proposed licence comprises an area of approximately 3.0074 square kilometres located 58 kilometres south westerly of Yalgoo, in the Shire of Yalgoo. The proposed licence is wholly situated within the registered native title claims of the Mullewa Wadjari Community (WC1996/093 – registered from 19 August 1996), the Widi Mob (WC1997/072 – registered from 26 August 1997 to 5 May 1999, and from 12 December 2011) and the Amangu People (WC2004/002 – registered from 3 March 2005).

[3] An objection to the inclusion of the expedited procedure statement may be made to the National Native Title Tribunal ('the Tribunal') within four months of the notification day (see s 32(3) of the Act). 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 9 January 2014 and the four month closing date was 9 February 2014. By the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the four month closing date for lodgement became 10 February 2014, the next working day.

[4] On 17 January 2014, an objection application was lodged with the Tribunal by Leedham Papertalk and others on behalf of Mullewa Wadjari ('the native title party'). I accepted the application pursuant to s 77 of the Act on 3 February 2014. An objection application was also lodged with the Tribunal on behalf of the Amangu claim (WO2014/0077), but the objection was subsequently withdrawn on 5 June 2014.

[5] At a preliminary conference held on 4 March 2014, 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. On 5 June 2014, the grantee party requested that the matter proceed to inquiry and I set directions accordingly that day. These directions required each party to file a statement of contentions and supporting documentary evidence.

[6] DMP provided supporting documents on behalf of the Government party on 14 May 2014. On 17 July 2014, the native title party provided a statement of contentions ('NTP Contentions') and the affidavit of Mr Leedham Papertalk affirmed on 17 July 2014. The grantee party provided a statement of contentions on 12 August 2014 ('GP Contentions') and the State Solicitor's Office provided the Government party's contentions on 14 August 2014 ('Government Party Contentions'). The grantee party's contentions were due on 31 July 2014, and therefore filed approximately seven days late. However, I note that a cover letter to the grantee party's contentions indicates that the delay was caused by illness. No party objected to the late contentions and I accepted the contentions in the circumstances.

[7] A listing hearing was scheduled for 11 September 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 5 November 2014, the Tribunal provided parties with a map depicting the proposed licence and surrounding areas produced by the Tribunal's geospatial services to assist with the determination of this objection. On the same day, the DMP requested a 'zoomed in' version of the map, which was subsequently provided. No party objected to the Tribunal's use of either the original or 'zoomed in' maps.

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* (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 maintained by the Department of Aboriginal Affairs pursuant to the *Aboriginal Heritage Act 1972* (WA) ('AHA') ('DAA Register').
- 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. (Note I refer to the Tengraph quick appraisal submitted with the State Solicitor's Office contentions dated 14 August 2014 for the purpose of this determination, which differs from the one submitted by DMP dated 14 May 2014).

[12] The Tengraph quick appraisal indicates that the underlying land tenure comprises 100 per cent Unallocated Crown Land.

[13] The area has previously been subject to:

- Five surrendered or expired exploration licences held between 1984 to 2007, overlapping the proposed licence at between 0.7 per cent and 100 per cent;

- Three surrendered mining leases in operation between 1988 and 1994, overlapping the proposed licence at between 28 and 72 per cent;

- Seven mineral claims in operation between 1974 and 1985, overlapping the proposed licence at between 1.0 per cent and 36.5 per cent, with an average lifespan of two years; and

- One surrendered prospecting licence held between 1994 and 1997, overlapping the proposed licence at 5.7 per cent.

[14] The quick appraisal also shows the services affected by the proposed licence are:

- Closed mine shafts at Dunbar and Murdalyou Range 3;

- Three tracks; and

- A fence line.

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

[16] 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 *Tullock v Western Australia* at [11], as well as additional conditions 5-7, outlined below:

> 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 respect to the area designated as CPL 24 in TENGRAPH the following conditions apply:

5. Prior to any ground-disturbing activity, as defined by the Executive Director, Environmental Division, DMP. The program to include:
    - maps and/or aerial photographs showing all proposed routes, construction and upgrading of tracks, camps, drill sites and any other disturbances;
    - the purpose, specifications and life of all proposed disturbances;
    - proposals which may disturb any declared rare or geographically restricted flora and fauna; and
    - techniques, prescriptions and timetable for the rehabilitation of all proposed disturbances

6. The licensee, at his expense, rehabilitating all areas cleared, explored or otherwise disturbed during the term of the licence to the satisfaction of the Executive Director, Environment Division, DMP. Such rehabilitation as appropriate and may include:
    - stockpiling and return of topsoil
    - backfilling all holes, trenches and costeans;
    - ripping;
    - contouring to the original landform;
    - revegetation with seed; and
    - capping and backfilling of all drill holes.

7. Prior to the cessation of exploration/prospecting activity the licensee notifying the Environmental Officer, DMP and arranging Draft an inspection as required

[17] 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 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 had been issued by the DOW.

[18] The Government Party Contentions indicates it intends to impose the following condition on the proposed licence requiring the grantee party to enter into a Regional Standard Heritage Agreement ('RSHA') with the native title party if requested ('RSHA condition'), in the following terms (at 21 Government Party Contentions):

> In respect of the area covered by the licence, the licensee, if so requested in writing by the Mullewa Wadjari Community, the applicants in Federal Court application No. WAD6119 of 1998 (WC1996/093), such request being sent by pre-paid post to reach the licensee'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 Mullewa Wadjari Community the Regional Standard Heritage Agreement ("RHSA") endorsed by peak industry groups (eg the Goldfields/South west/Ngaanyatjarra/Pilbara/Yamatji Land and Sea Council) and offered by the Native Title Party or their representative.

Native title party contentions and evidence

[19] It appears the native title party has developed a practice of submitting contentions and affidavits based on pro forma versions of its objection application which proceed to inquiry before the Tribunal. In this matter, the NTP Contentions and affidavit are very similar to those submitted in a number of previous matters (most recently *Papertalk v Kalamazoo Resources*; *Papertalk v Boadicea Resources*; and *Papertalk v FMG Resources*). The Government party contend that seemingly identical evidence and contentions had been provided to the Tribunal by the native title party in at least three other inquiries, each of which had dealt with areas some distance from one another and from the proposed licence (being *Papertalk v Stokes*; *Papertalk v Top Iron*;

Papertalk v Kennedy). On that basis, the Government party contend caution should be exercised in considering the native title party's evidence and contentions, and the Tribunal should place less weight on the material than may ordinarily expected, as it was not unique to the tenement area in that matter or specific to the inquiry (Government Party Contentions at 29). I agree with the Government party in that contentions and evidence should be, as much as possible, focused on the specific tenement which is the subject of an inquiry - if similar evidence applies equally to a number of different tenements, the argument that specific activities, or specific sites on one tenement will be disturbed to the extent required by s 237 of the Act, by activities of a grantee party, is weakened.

Section 237(a)

[20] The NTP Contentions which address community or social activities refer to the native title party's regular four-day 'hunting weekends' within the proposed licence, as well as on the lands bounded by Geraldton, Nerramyne, Yuin Station and Yalgoo (at 10).

[21] As mentioned, the contentions are supported by the affidavit of Mr Leedham Papertalk, affirmed on 17 July 2014. Mr Papertalk deposes (at 2) that he is a senior initiated man and has the right to speak on behalf of the native title party. He attests to being familiar with the proposed licence area and says he visits the area on a regular basis (at 4). Mr Papertalk is a named applicant of the native title party and I accept that he has authority to give evidence in this matter. (At 22 he refers to P59/1991 rather than the current proposed licence, but I accept that is a typographical error as in all other respects the affidavit refers to the current matter).

[22] The NTP Contentions and Mr Papertalk's affidavit note the following details regarding the native title party's community and social activities during the course of 'hunting weekends':

- The hunting weekends involve activities such as foraging, hunting and gathering, fishing, trading, camping, attending law ceremonies and the teaching of laws and customs to children (at 12 NTP Contentions, also at 7 of Mr Papertalk's affidavit);

- The hunting weekends occur on an almost weekly basis (if weather permits). Although known as 'hunting weekends' amongst the Mullewa Wadjari community, the hunting trips do not always occur on the same days of the week nor do they always include Saturday and Sunday (at 12 NTP Contentions, also at 8 of Mr Papertalk's affidavit);

- Generally around 90% of the Mullewa Wadjari community members attend the weekly hunting weekends, which usually amount to more than 100 people travelling on country in more than twenty 4WD vehicles. The native title party encourages a high child to adult ratio on these hunting weekends because one of the important objectives is to educate the children about the native title party's customs and traditions (at 13 NTP Contentions, also at 9 -11 of Mr Papertalk's affidavit);

- In addition to the community-wide hunting weekends, individual members and families of the native title party also regularly travel within and across the tenement area for hunting and gathering, foraging, fishing and camping purposes (at 14 NTP Contentions, also at 12 of Mr Papertalk's affidavit);

- During the hunting weekends, the community members hunt for native fauna such as kangaroos, emus, wild turkeys, goannas, porcupines, blue tongue lizards and snakes. Occasionally, the members also hunt non-native species such as goats and rabbits (at 15 NTP Contentions, also at 13 of Mr Papertalk's affidavit);

- A large proportion of the meats and foods gained from the hunting weekend are brought back to the Mullewa Wadjari community where they are shared amongst the members, including those who could not attend the hunting trip (at 16 NTP Contentions, also at 14 of Mr Papertalk's affidavit);

- Hunted meats are also used to trade for commodities such as petrol and diesel which is used by members of the community (at 17 NTP Contentions, also at 15 of Mr Papertalk's affidavit);

- The tenement area is also known to the Mullewa Wadjari People as being 'rich in bush tucker' especially emu eggs and including *gogola* (small, green pod

shaped fruit, which is very sweet), *jalga* (bean like vegetable which can be eaten raw or cooked) and the sweet sap from the *Bimba* trees 'which are especially prevalent in the tenement area' (at NTP Contentions 19);

- The seeds of the *jalga* are high in nutrients and the Mullewa Wadjari People collect them by the bag-full from within the tenement area. If the bush tucker is in season, then members of Mullewa Wadjari will visit the tenement area 'on almost a weekly basis' to collect it (at NTP Contentions 19); and

- During the hunting weekends, adults within the native title party will teach the children traditional knowledge (including travelling to significant sites, boundaries of culturally restricted areas, location of bush medicine, food and water, cooking techniques, use of tools, reading the sky, traditional language and culture, dreamtime stories, the proper use of tools for hunting and cooking, and maintaining a balance between traditional and western lifestyles) (at 21 NTP Contentions, also at 17 of Mr Papertalk's affidavit).

[23] The native title party contends (at 24 NTP Contentions, also at 18 of Mr Papertalk's affidavit) that if exploration activities such as those contemplated by s 66 of the *Mining Act* are carried out on the proposed licence, there is a real chance or risk that such activities will interfere directly with the carrying on of the native title party's community and social activities, in particular:

- hunting, gathering, fishing, camping and the teaching of laws and customs to children;

- the balance of wildlife and food sources around the proposed licence which will directly interfere with hunting, foraging and fishing activities; and

- if land on the proposed licence is damaged, the native title party will have to travel further out in order to hunt and gather food and resources.

[24] Mr Papertalk also refers (at 19-21 NTP Contentions) to signs erected by a miner near 'Badga Station' which he states is 'in the vicinity' of the proposed licence - the signs purported to prohibit hunting in the area. However, I note there is no evidence that

the miner is associated with the grantee party in this matter, or evidence as to the location of 'Badga Station' relative to the proposed licence.

Section 237(b)

[25] The NTP Contentions addressing sites or areas of particular significance state:

- The fact that the DAA Register does not record any sites does not mean that sites do not exist on the proposed licence (at 30);
- The native title party 'are fearful of the adverse consequences which may befall them if their ancestors sprits are disturbed by damage or interference with the places that they inhabit' (at 31);
- The nature of some sites within the proposed licence area are such that even non ground disturbing work may cause interference with sites to a level that is distressing to the native title party, and culturally inappropriate to a degree that would constitute interference for the purposes of s 237(b) of the Act (at 32);
- Despite the protections afforded by the *Aboriginal Heritage Act*, 'suspected damage as a result of mining activities has already materialised at the Tallering Peak site and at Bangemall Pool', which falls within the native title party's claim area. The native title party believes in that situation, 'its failure to protect Tallering Peak and Bangemall Pool has caused the death of several members from the Native Title Party' (at 33); and
- The significant sites existing within the proposed licence cannot be adequately protected by the *Aboriginal Heritage Act* because their locations are unknown to the grantee party (at 34).

Section 237(c)

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

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

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

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

Grantee party contentions and evidence

[27] The GP Contentions state the grantee party intends to conduct initial soil sampling over the surface area of the proposed licence, consisting of metal detecting and soil sampling. They indicate that early stage work programs will not required ground-disturbing activities, and that access to the exploration targets will be via the existing tracks. They attach images to the contentions which they state demonstrate a substantial disturbance to the area from numerous previous tenement holders. While the grantee party representative has provided a signed statement supporting the images relate to this proposed licence, an affidavit to that effect would have been more persuasive, and co-ordinates of where the images had been taken would also have assisted. Given this lack of detail, I give little weight to the images provided.

[28] The GP Contentions also state that the grantee party is fully aware of the requirements of the *Aboriginal Heritage Act* 1972. They note that they are willing to enter into the RSHA, and 'would be agreeable to undertake a heritage survey if required in order to ensure that Aboriginal Sacred Sites are not disturbed'.

Government party contentions and evidence

[29] The Government party state it proposes to impose the endorsements and conditions set out in the Draft Tenement Endorsement and Conditions Extract (as noted at [16]-[17] of this decision).

[30] The Government party state, 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 25). The Government party contends

the grantee party's contentions provide a firm basis for concluding that the criteria of s 237 of the Act will not be breached (at 26).

s 237(a)

[31] The Government party accepts (at 27), based upon the native title party's contentions and the evidence in Mr Papertalk's affidavit, that the various community and social activities (as outlined at [22] of this decision) take place within the proposed licence area and surrounding area. However, they contend that the native title party's evidence tends to support a conclusion that activities on the proposed licence will not directly interfere with their community or social activities because:

- the native title party contends that it has undertaken a very significant level of hunting activity and acknowledged and observed a number of asserted traditional laws and customs over a number of decades without any of the perceived direct interferences occurring. Where the proposed licence area is accessed on a weekly basis (or thereabouts) by over 100 people, with an excess of 20 4WD vehicles, and can sustain the food requirements of a 'significant number' of Mullewa Wadjari people despite the lengthy history of exploration, mining and other activities, it is reasonable to accept and infer that the proposed licence will not have a direct impact on the identified community and social activities (Government Party Contentions at 50);

- any intersection between the grant of the of the proposed licence and the current activities of the native title party in the proposed licence area would be the same as, or no more significant than, the previous use of the area (Government Party Contentions at 51);

- in regard to Mr Papertalk's evidence at (19) to (21) of his affidavit, which relates to accessing an area purported to be restricted (Government Party Contentions at 52):

    - there is no evidence or information which enables the location of 'Badga Station' to be identified, particularly its proximity to the proposed licence area;

- evidence regarding a third party unrelated to the grantee party and who is otherwise undertaking mining activity as opposed to exploration activities is of no relevance to this matter; and
- whatever the basis for erecting the identified sign, the sign did not physically prevent hunting activity and therefore the reference to it is of no relevance;

- the slight risk that the grantee party, exercising its full rights under the proposed licence, might physically be in the way of a member of the native title party in relation to the small area of land where they are operating on any given day is not substantial enough to constitute interference for the purposes of s 237(a) of the Act (Government Party Contentions at 53);
- the grantee party has indicated that access to the exploration targets will be via existing tracks, and hunting and other activities would not be undertaken over tracks (Government Party Contentions at 53); and
- the grantee party has indicated its willingness to enter into an RSHA type agreement with the native title party (Government Party Contentions at 55).

Section 237(b)

[32] The Government party asserts that the NTP Contentions do not specifically identify any areas or sites of particular significance within the proposed licence area; rather, the native title party contends that the proposed licence area 'may' contain significant sites (Government Party Contentions at 68). The Government party state that such evidence is of no forensic value to the Tribunal, as the existence of sites of particular significance, their number and distribution is a question of fact in each case (Government Party Contentions at 72).

[33] The Government party state they do not accept the submission, generally made in the NTP Contentions, that mere presence in an area may cause direct interference with that area (Government Party Contentions at 74).

[34] The Government party argue that, in the event there are any sites of particular significance within the proposed licence, interference is unlikely because (Government Party Contentions at 75):

- proposed exploration activities will be low impact and non intrusive;
- evidence about interference with ancestral spirits reflects a general spiritual concern to which to which s 237(b) does not apply. If the general assertion that any ground disturbing activity will disturb ancestral spirits were sufficient to disapply the expedited procedure, then it would be disapplied to the grant of almost all exploration licences in the vast majority of Australia. In the Government party's submission, that outcome would be incongruent with Parliament's intention in drafting s 237 of the Act;
- the proposed licence has been subject to prior mineral exploration and possibly mining activity. The proposed activities of the grantee party are likely to be the same as, or no more significant than, the previous and continuing use of the land; and
- the regulatory regime is likely to prevent interference with any site of particular significance.

Section 237(c)

[35] The Government party submits that s 237(c) is only enlivened where there is a significant, direct, physical disturbance of the land or waters (by which the Act intends digging, drilling or some other means by which land or waters are moved, removed or diverted) (Government Party Contentions at 83). It further argues that the qualification of 'major' must be given its ordinary meaning and is to be objectively assessed, and that while the perspective of Aboriginal people is relevant, it does not convert the notion into a subjective one to be determined solely by the opinions of the native title party (Government Party Contentions at 84).

[36] The Government party state that major disturbance to land or waters is unlikely because (Government Party Contentions at 85):

- the proposed exploration activities are low-impact, and any ground disturbing activities are intended to be conducted in a manner which will respect local Aboriginal cultural concerns and not adversely impact on heritage sites;

- the State's regulatory regimes, and the proposed conditions and endorsements, are likely to avoid and or mitigate any disturbance to land or waters;
- any authorised disturbance to land and waters caused by the grantee party may be mitigated by the proposed conditions requiring rehabilitation of the land following completion of exploration;
- the proposed licence has been subject to prior mineral exploration and possibly mining activity. The activities proposed by the grantee party are likely to be the same as, or no more significant than, the previous and continuing use of the area; and
- the proposed licence does not have particular characteristics that would be likely to result in major disturbance as per s 237(c).

Considering the evidence

Community or social activities (section 237(a))

[37] The Tribunal is required to make a predictive assessment of whether the grant of the proposed licence and activities undertaken in relation to the grant are likely to interfere with the community or social activities of the native title party (in the sense of there being a real risk of interference), (see *Smith v Western Australia* at [23]). Direct interference involves an evaluative 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 [23]). The assessment is also contextual, taking into account factors that may already have impacted on a native title party's community or social activities (such as mining or pastoral activity) (see *Smith v Western Australia* at [27]).

[38] The Tribunal has accepted that the intentions of the grantee party in a particular matter are relevant in assessing whether the activities are likely to directly interfere with the carrying on of a native title party's community or social activities, or interfere with areas or sites of particular significance to a native title party. I adopt the approach taken in *Silver v Northern Territory* (at [29]-[30]), where it was outlined that:

> The adoption of a predictive assessment necessarily allows the Tribunal to receive evidence of a grantee's intention where that evidence is adduced. In the absence of any evidence of intention, the Tribunal would be at liberty to assume that a grantee will fully exercise the

> rights conferred by the tenement...evidence of intention cannot be unilaterally discarded in advance, as it is logically relevant to the question of likelihood.

[39] The grantee party's intended activities have been outlined in terms of its initial exploration program, and its general approach to its activities, and its intentions are outlined at [27]-[28] of this decision. I note in particular that the grantee party has indicated its willingness to enter into an RSHA and the Government party will impose such a condition on grant.

[40] The native title party's submissions relating to s 237(a) of the Act are outlined at [20]-[24] above, which relate to its camping, hunting, fishing and education of children activities on the proposed licence. In response to the native title party's contentions, the Government party states it accepts that members of the native title party carry out community or social activities such as camping, fishing, hunting and education of its children within the proposed licence. While the evidence demonstrates members of the native title party carry out community and social activities on the proposed licence, the Government party submits there is not likely to be direct interference for the reasons listed at [31] above, and I accept those reasons.

[41] For example, I accept that past and present exploration and mining activities are likely to have affected, and are likely to continue to affect, the community or social activities of the native title party if and where they exist. While there is no specific evidence of the degree of such interference, the Tribunal is entitled, as part of the overall context, to have regard to the fact that these previous activities will already to some extent have interfered with the native title party's community and social activities (see *Tullock v Bushwin* at [122]).

[42] The total area of the Mullewa Wadjari People claim is approximately 35,621.0516 square kilometres and the proposed licence is approximately 3.0074 square kilometres. Consistent with previous Tribunal decisions, such as *Cooke v Dioro Exploration*, I find the size of the proposed licence area, in the context of the much larger native title claim area, makes it less likely that the proposed exploration activity will interfere with the native title party's community or social activities.

[43] Further, while the native title party has provided evidence of the frequency of its community and social activities and the specific activities that take place on the proposed licence area, the native title party has not provided contentions or evidence as

to why these activities could only take place on the proposed licence as compared to taking place elsewhere within the larger native title claim area.

[44] The Tribunal must have regard to the fact that the grantee party's access to the area would be temporary and limited to the areas in which exploration is taking place. In general, the Tribunal has found that, because of its relatively limited and temporary nature, exploration activity is not likely to directly interfere with a native title party's community or social activities except in an incidental and insubstantial way. I believe this is such a case.

[45] In the circumstances, taking into account the evidence available, I am unable to conclude there would be interference of the kind contemplated by s 237(a) of the Act in this matter.

Sites of particular significance (s 237(b))

[46] The issue the Tribunal is required to determine in relation to s 237(b) of the Act is whether there is likely to be (in the sense of a real risk of) interference with areas or sites of particular (that is, more than ordinary) significance to the native title party in accordance with their traditions. As noted above, it is established in DAA documentation that there are no registered sites within the proposed licence area and no 'other heritage places'. However, this does not mean there may not be other sites or areas of particular significance to the native title party over the area of the proposed licence or in the vicinity.

[47] The Register does not purport to be a record of all Aboriginal sites in Western Australia, and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters. The AHA protects 'Aboriginal sites', as defined in s 4 of the AHA, whether those sites are registered or not. Section 4 defines 'Aboriginal site' to mean a place to which the AHA applies 'by the operation of section 5'. While some sites may be administratively assessed as not being an 'Aboriginal site' under the AHA, those sites may still be 'areas or sites of particular significance' to the native title party 'in accordance with their traditions' as per s 237(b) of the Act.

[48] The native title party contentions directed at s 237(b) of the Act are outlined at [25] in this decision.

[49] Neither the NTP Contentions nor Mr Papertalk's affidavit identify the existence of any specific sites of particular significance on the proposed licence area. The Tribunal has held, on previous occasions, that the native title party must provide evidence with sufficient detail and specificity to allow the Tribunal to make the predictive assessment required by s 237(b) (see for example *Parker v Iron Duyfken* at [39]; *Cheinmora v Heron Resources* at [43]). The evidence before me does not disclose a sufficient basis to reach a conclusion that any sites exist, the particular significance of these sites if they do exist, or the likelihood of them being interfered with.

[50] The native title party contentions outlines suspected damage done to Tallering Peak and Bangemall Pool, however, this is not referred to in Mr Papertalk's affidavit, these features are approximately 75km north west of the proposed licence, and there is no evidence to suggest such damage was caused by the grantee party. The grantee party has indicated that it is aware of the requirements of the AHA.

[51] The regulatory regime based on the AHA has been described on numerous occasions by the Tribunal (see for example, *Parker v Ammon* (at [31]-[38], [40]-[41]). While the Tribunal has usually found the site protective regime based on the AHA is sufficient to ensure any interference with sites of particular significance is unlikely, each matter must be considered on its own facts (see *Cherel v Faustas Nominees* (at [81]-[91]). The Tribunal must consider, based on facts of particular cases and the nature and extent of sites of particular significance, whether this protective regime is sufficient to make it unlikely that there will be interference with sites of particular significance. I am satisfied, based on the available evidence, that the AHA and its associated processes, together with the endorsements and conditions to be placed on the proposed licence, are likely to prevent interference with any area or site of 'particular significance' in the context of exploration activities.

[52] Taking all of these factors into account, I find that even if sites of particular significance exist on or near the proposed licence, there is no real risk of interference with such sites as a result of the grant of the proposed licence, as envisioned by s 237(b) of the Act.

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

[53] The Tribunal is required to make an evaluative judgment on 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]).

[54] The native title party contentions directed at s 237(c) of the Act are outlined at [26] of this decision.

[55] The Government party states that s 237(c) is only enlivened where there is a significant, direct physical disturbance of the land or waters (by which the Act intends digging, drilling, or some other means by which land or waters are moved, removed or diverted). It is well established that the starting point and pre-condition of any inquiry into matters relating to s 237(c) is evidence of proposed physical disturbance of land and waters (see *Rosas v Northern Territory* at [84]). To that extent, I agree with the Government party's response that s 237(c) relates to significant, direct physical disturbance of land or waters.

[56] The Government party contentions note that the grant of the proposed licence is not likely to involve major disturbance to the land or create rights, the exercise of which is likely to involve major disturbance to the land, for the reasons outlined at [36] of this decision.

[57] In relation to whether or not there is likely to be major disturbance to land or waters in this matter, I have had regard to a number of factors, including the following:

- there is no evidence of any sensitive topographical, geological or environmental factors which would lead people to think that exploration activities would result in major disturbance to land or waters
- the conditions imposed on the proposed licence deal with ground disturbing activities, including requirements for rehabilitation (standard conditions 1-4) and numerous additional conditions and endorsements;
- the grantee party is willing to enter into an RSHA with the native title party;

- the endorsements on the proposed licence direct the grantee party's attention to the *Environmental Protection Act 1986* (WA), the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA), the *Water Conservation Act 1976* (WA), the *Rights in Water and Irrigation Act 1914* (WA), the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA), the *Country Areas Water Supply Act 1947* (WA), the *Water Agencies (Powers) Act 1984* (WA), and the *Water Resources Legislation Amendment Act 2007* (WA);
- the endorsements on the proposed licence restrict the grantee party's interference with water resources on the proposed licence; and
- there is no evidence that the grantee party is likely to fail to comply with the regulatory regime.

[58] Taking into account all of these considerations, I do not find it likely that major disturbance to land and waters is likely to occur in this matter, as envisioned by s 237(c) of the Act.

Determination

[59] The determination of the Tribunal is that the act, namely the grant of exploration licence E59/1991 to Colin David Gardiner and Laurie Dowding, is an act attracting the expedited procedure.

Helen Shurven
Member
19 November 2014