

NATIONAL NATIVE TITLE TRIBUNAL

Leedham Papertalk and Others on behalf of Mullewa Wadjari v Kalamazoo Resources Pty Ltd and Another [2014] NNTTA 108 (7 November 2014)

Application Nos: WO2013/1214, WO2013/1233 & WO2013/1234

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 -

Kalamazoo Resources Pty Ltd (grantee party)

DETERMINATION THAT THE ACTS ARE ACTS ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member

Place: Perth

Date: 7 November 2014

Catchwords: Native title – future acts – proposed grant of prospecting licences – expedited procedure objection applications – whether acts likely to interfere directly with the carrying on of community or social activities – whether acts likely to interfere with sites of particular significance – whether acts likely to 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 48, 66
[Acts Interpretation Act 1901 \(Cth\)](#), s [36](#)(2)

Cases: *Banjo Wurrunmurra & Others on behalf of the Bunuba Native Title Claimants/Western Australia/Monte Ling, Kevin Peter Sibraa* [2007] NNTTA 21 (*Wurrunmurra v Ling*)
Champion v Western Australia (2005) 190 FLR 362; [\[2005\] NNTTA 1](#) (*Champion v Western Australia*)

Cheinmora v Heron Resources Ltd (2005) 196 FLR 250; [\[2005\] NNTTA 99](#) ('*Cheinmora v Heron Resources*')

Cosmos on behalf of the Yaburara & Mardudhunera/Western Australia/Croydon Gold Pty Ltd [\[2013\] NNTTA 86](#) ('*Cosmos v Croydon Gold*')

Cyril Barnes and Others on behalf of Central East Goldfields People/Western Australia/Karl Christian Pirkopf [\[2012\] NNTTA 50](#) ('*Barnes v Pirkopf*')

Karajarri Traditional Lands Association (Aboriginal Corporation)/Western Australia/ASJ Resources Pty Ltd [\[2012\] NNTTA 18](#) ('*Karajarri Traditional Lands Association v ASJ Resources*')

Leedham Papertalk & Ors 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/Western Australia/Top Iron Pty Ltd [\[2013\] NNTTA 64](#) ('*Papertalk v Top Iron*')

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*')

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

Papertalk and Others on behalf of Mullewa Wadjari v Harold John Stokes [\[2014\] NNTTA 19](#) ('*Papertalk v Stokes*')

Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd [\[2003\] NNTTA 62](#) ('*Boddington v Bacome*')

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

Smith v Western Australia (2001) 108 FCR 442; [\[2001\] FCA 19](#) ('*Smith v Western Australia*')

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

Ward v Western Australia (1996) 69 FCR 208; [\[1996\] FCA 1452](#) ('*Ward v Western Australia*')

Western Desert Lands Aboriginal Corporation (Jamukurnu Yapalinkunu) RNTBC v Teck Australia Pty Ltd [\[2014\] NNTTA 56](#) ('*Western Desert v Teck Australia*')

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

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**Representative of the
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REASONS FOR DETERMINATION

- [1] On 29 July 2013 and 12 August 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 prospecting licences P59/2025, P59/2021 and P59/2022 ('the proposed licences') to Kalamazoo Resources Pty Ltd ('the grantee party'). The Government party included in each notice a statement that it considered each 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 notification days were specified as follows:

Proposed Licence	Notification Day	Size	Location	Shire
P59/2025	31 July 2013	6.66 hectares	76 kilometres northwest of Yalgoo	Murchison
P59/2021	14 August 2013	21.02 hectares	78 kilometres northeast of Mullewa	Murchison
P59/2022	14 August 2013	23.95 hectares	81 kilometres northeast of Mullewa	Murchison

- [2] Each notice states the grant of a prospecting licence authorises the applicant to prospect for minerals for a term of four years from the date of the grant. The proposed licences are 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 12 December 2011) and the Wajarri Yamatji (WC2004/010 – registered from 5 December 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 ss 32(3) and 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; or any body corporate that is registered in respect of the relevant land or waters three months after the notification day. The notice for P59/2025 advised the three month closing date was 31 October 2013 and the four month closing date was 30 November 2013. The notice for P59/2021 and P59/2022 advised the three month closing date was 14 November 2013 and the four month closing date was 14 December 2013. By the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the four month closing dates for lodgement became 2 December 2013 and 16 December 2013 respectively, being the next working days.

- [4] On 29 November 2013, objection applications were lodged with the Tribunal by Leedham Papertalk and others on behalf of Mullewa Wadjari ('the native title party') in respect of the proposed licences, designated Tribunal application numbers: WO2013/1214 for P59/2025; WO2013/1233 for P59/2021; and WO2013/1234 for P59/2022. Objection applications were also made on behalf of the Wajarri Yamatji claim, but were subsequently withdrawn. No objection applications were lodged by the Widi Mob.

- [5] At the status conference held on 14 May 2014, the grantee party indicated it had reached an agreement with the Wajarri Yamatji and was not prepared to enter into agreements with an additional native title party. Consequently, directions were issued for the conduct of the inquiry into the objections made by the native title party. These directions required each party to file a statement of contentions and supporting documentary evidence for each objection application.

- [6] DMP provided supporting documents on behalf of the Government party on 28 May 2014. Following a request for an extension for each matter, the native title party provided: a statement of contentions for P59/2025 on 2 July 2014, supported by the affidavit of Mr Leedham Papertalk affirmed on the same day ('Mr Papertalk's affidavit 1'); a statement of contentions for P59/2021 on 9 July 2014, supported by the affidavit of Mr Leedham Papertalk affirmed on the same day ('Mr Papertalk's affidavit 2'); and its statement of contentions for P59/2022 on 9 July 2014, with no supporting affidavit. The grantee party provided statements of contentions for P59/2021 and P59/2022 on 22 July 2014, and for P59/2025 on 6 August 2014. The

State Solicitor's Office provided the Government party's contentions for P59/2025 on 29 July 2014 and for both P59/2021 and P59/2022 on 5 August 2014. Amended contentions for P59/2025 were provided on 30 October 2014 (whereby a condition which had been omitted in error was included).

- [7] On 21 August 2014 a listing hearing was held for WO2013/1214 at which parties agreed to proceed 'on the papers' (that is, without a hearing) in accordance with s 151(2) of the Act. A listing hearing for WO2013/1233 and WO2013/1234 was scheduled for 28 August 2014 but was vacated with the consent of the parties, who agreed to proceed 'on the papers'. I am satisfied it is appropriate to make a determination in that manner.
- [8] On 17 October 2014, the Tribunal provided parties with copies of maps produced by the Tribunal's Geospatial Unit depicting the proposed licences and surrounding areas. The maps were provided to assist with the determination of the objection applications and no party objected to the Tribunal using the maps 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 licences:

- Tengraph plans with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity of the proposed licences.
- Reports and plans from the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs pursuant to the *Aboriginal Heritage Act 1972* (WA) ('AHA') ('DAA Register').
- Copies of each of the proposed licence applications.
- Draft Tenement Endorsements and Conditions Extracts.
- Tengraph quick appraisals detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features.

[12] The Tengraph quick appraisals indicate each of the proposed licences is entirely overlapped by Yuin pastoral lease 3114/1161, except for a small portion of Common Reserve 48494 (Rabbit proof Fence No. 3) which overlaps P59/2022 at 1.2 per cent. Ground Water Area 17 (Gascoyne) and Surface Water Area 19 (Greenough River and Tributaries) entirely overlap each of the proposed licences.

[13] The entire area of P59/2025 is currently subject to P59/1697, granted in 2004 and held by Carlinga Mining Pty Ltd. The entire area of P59/2025 was also previously subject to E59/144, granted in 1986 and surrendered in 2002.

[14] No current mining tenure overlaps P59/2021 or P59/2022. The entire area of both these proposed licences were previously subject to E59/174, granted in 1987 and surrendered in 1992.

[15] The quick appraisals show Greenough River runs through P59/2021; a track and fence line are located on P59/2022; and an airfield runway, a track and fence line are located on P59/2025.

[16] Reports from the DAA Register establish there are no registered sites or ‘other heritage places’ within P59/2022 and P59/2025. A portion of Greenough River mythological site (ID 24761, unrestricted) is located within P59/2021.

[17] The draft Endorsement and Conditions Extract for the proposed licences indicate the grants will be subject to the standard four conditions imposed on the grant of all prospecting licences in Western Australia (see *Tullock v Western Australia* at [11]) and:

5. The Licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs, water carting equipment or other mechanised equipment.
6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of –
 - the grant of the Licence; or
 - registration of a transfer introducing a new Licensee;
 advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.

[18] P59/2022 contains an additional condition relating to the Rabbit Proof Fence No.3:

7. Mining on a strip of land 30 metres wide with the Rabbit Proof Fence No. 3 as the centre-line being restricted to below a depth of 15 metres from the natural surface.

[19] P59/2025 contains an additional condition relating to the airfield runway:

7. No interference with the use of the Aerial Landing Ground and mining thereon being confined to below a depth of 15 metres from the natural surface.

[20] In each of its contentions (at 19), the Government party proposes to place a further condition on the proposed licences which provide the native title party with the opportunity to request the grantee party enter into the Regional Standard Heritage Agreement (‘RSHA condition’):

In respect of the area covered by the licence, the Licensee [*sic*], if so requested in writing by Mullewa Wadjari Community... (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 Mullewa Wadjari Community the Regional Standard Heritage Agreement endorsed by peak industry groups...

[21] 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 licences:

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 prospecting 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 [*sic*]:

8. The abstraction of groundwater is prohibited unless a current licence to construct/alter a well and a licence to take groundwater has been issued by the DoW.
9. No prospecting being carried out that may disrupt the natural flow of any waterway unless in accordance with a current licence to take surface water or permit to obstruct or interfere with beds or banks issued by the DoW.
10. Advice shall be sought from the DoW and the relevant service provider if proposing prospecting being carried out in an existing or designated future irrigation area, or within 50 metres of an irrigation channel, drain or waterway.

Native title party contentions and evidence

[22] It appears the native title party has developed the practice of submitting contentions and affidavits based on pro forma versions of its objection applications which proceed to an inquiry before the Tribunal. In this matter, the native title party's contentions and affidavits bear a striking resemblance to those submitted in a number of previous matters (most recently in *Papertalk v Boadicea Resources* and *Papertalk v FMG Pilbara*). In *Papertalk v Boadicea Resources* [at 29], the Government party contended that seemingly identical evidence and contentions had been provided to the Tribunal in at least three other inquiries, each of which had dealt with areas some distance from one another and from the proposed licence for that matter (being *Papertalk v Stokes*; *Papertalk v Top Iron*; *Papertalk v Kennedy*). On that basis, the Government party contended 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 be expected, as it was not unique to the tenement area in that matter or specific to that inquiry.

s 237 (a)

[23] Each of the native title party's contentions addresses community or social activities in almost identical terms. They refer to the native title party's regular four-day 'hunting weekends' within each of the proposed licences, as well as on the lands bounded by Geraldton, Nerramyne, Yuin Station and Yalgoo (at 10).

[24] The contentions for P59/2025 and P59/2021 are supported by Mr Leedham Papertalk's affidavits 1 and 2 sworn on 2 and 9 July 2014 respectively. There is no accompanying affidavit for the contentions filed for P59/2022. Mr Papertalk deposes in each affidavit (at 2) that he is a senior initiated man and has the right to speak on behalf of the native title party. He attests he is familiar with P59/2025 and P59/2021 and visits the areas on a regular basis (at 3-4). Mr Papertalk is named as one of the persons comprising the Applicant for the native title party's claim and I accept he has authority to give evidence in these matters.

[25] Each of the contentions and affidavits note the following details regarding the native title party's community and social activities during the course of the 'hunting weekends':

- 'Weather permitting, 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' (All contentions at 12, supported at 8 and 10 of Mr Papertalk's affidavits 1 and 2);
- The 'hunting weekends can occur almost on a weekly basis, but they do not always occur on the same days of the week, nor do they always include Saturday and Sunday' (Mr Papertalk's affidavits 1 and 2 at 9 and 11);
- 'up to 90% of Mullewa Wadjari local 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 practices is to educate the children about the Native Title Party's customs and traditions' (All contentions at 13, supported at 10-12 and 12-14 of Mr Papertalk's affidavits 1 and 2);
- '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' (All contentions at 14, also at 13 and 15 of Mr Papertalk's affidavits 1 and 2);
- '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' (All contentions at 15, supported at 14 and 16 of Mr Papertalk's affidavits 1 and 2);
- 'A large proportion of the meats and foods gained from the hunting weekend are brought back to the Mullewa Wadjari community where it is shared amongst the members, including those who could not attend the hunting trip' (All contentions at 16, supported at 15 and 17 of Mr Papertalk's affidavits 1 and 2);

- ‘Hunted meats are also used to trade for commodities such as petrol and diesel which is used by members of the community’ (All contentions at 17, supported at 17 and 19 of Mr Papertalk’s affidavits 1 and 2);
- ‘The tenement area is also known to the Mullewa Wadjari People as being an area which is rich in bush tucker’, 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’.

All contentions state ‘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’ (All contentions at 18-20, supported at 20-22 of Mr Papertalk’s affidavit 2).

- ‘During the hunting weekends, adults within the Native Title Party 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) (All contentions at 21, supported at 18 and 23 of Mr Papertalk’s affidavits 1 and 2).

[26] The native title party contends if prospecting activities such as those contemplated by s 66 of the *Mining Act 1978* (WA) (*‘Mining Act’*) are carried out on each of the proposed licences, then 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 (at 24-25 for P59/2025 and P59/2022, and at 25-26 for P59/2021, supported at 19 and 24 of Mr Papertalk’s affidavits 1 and 2). In particular:

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

- the balance of wildlife and food sources around each proposed licence which will directly interfere with hunting, foraging and fishing activities; and
- if land on each proposed licence is damaged, the native title party will have to travel further out in order to hunt and gather food and resources.

[27] For P59/2021, the native title party adds an additional contention to those noted above:

- worship activities currently undertaken by the native title party at sites including the Greenough River, the waterholes, rock holes and at *Ngunaraa* waterhole (supported at 25-28 of Mr Papertalk's affidavit 2)

s 237(b)

[28] The native title party contends the fact that the DAA Register records no sites other than the Greenough River does not mean that no other sites exist on each of the proposed licences (at 30 in each of the contentions).

[29] For P59/2025 and P59/2022, the native title party contends (at 33) that despite the protections afforded by the AHA, 'suspected damage as a result of mining activities has already materialised at the Tallering Peak site'. According to Tribunal mapping, the Tallering Peak site falls within the native title party's claim area, but is located some 30 kilometres south west of the proposed licences. The native title party believes 'since it failed to fulfil its duty to protect the sacred site, that the death of several members of the Native Title Party was the result of that failure' (at 33). For P59/2021, the native title party makes the same contentions, but in regard to 'sacred sites including those situated on or near the Greenough River' rather than the Tallering Peak site (at 38).

[30] In each of the contentions the native title party contends:

- The nature of some sites within each of the proposed licences 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 (Contentions for P59/2021 at 37, contentions for P59/2022 and P59/2025 at 32);

- The significant sites existing within the proposed licences cannot be adequately protected by the AHA because their locations are unknown to the grantee party (contentions for P59/2021 at 39, contentions for P59/2022 and P59/2025 at 34).

[31] For P59/2021, the native title party also contends:

- The Greenough River, its waterholes and rock holes are particularly significant to the native title party, and was the subject of a site visit with anthropologist Rory O'Connor and Mr Papertalk's father (at 31-34, supported at 25 of Mr Papertalk's affidavit 2);
- The native title party believes that 'after death, the spirits of its deceased members travel into water bodies such as those situated within the tenement. The spirits eventually settle in the land itself' (at 35, supported at 26 of Mr Papertalk's affidavit 2);
- '...watercourses form a major part of the Native Title Party's dreamtime stories... [which] include references to a man-like spirit snake named the *Bimbara* who resides in rivers, waterholes and natural springs... [and] can do good things for the people such as provide water, fill the land with plants and animals, and encourage growth within flora and fauna. However if the waterholes housing the *Bimbara* are disturbed, the Native Title Party's belief system teaches that the descendants of these spirits will experience misfortune, ill health and possibly death' (at 36, also at 26 and 31 of Mr Papertalk's affidavit 2);

[32] Mr Papertalk's affidavit 2 identifies the following sites, which may be located on P59/2021:

- The Greenough River and associated waterholes and rockholes 'within and around the tenement area' which contain 'many artefacts' (at 25). The native title party has a 'very strong cultural connection with the Greenough River, because the spirits of our ancestors and the *Bimbara* live in it' (at 26). 'The waterholes and rock holes inhabited by the *Bimbara* must not be visited by anyone who is not an initiated man' unless they are accompanied by an initiated man and the 'proper ways' of introduction are observed (at 26);

- A particular waterhole in a hill called *Ngunaraa* where the *Bimbara* and the native title party's ancestors live (at 27);

Mr Papertalk attests that '[o]ther initiated men from my community and I know exactly where these places are... [and] do not want these places to be recorded on any government record or register' (at 28-29).

s 237(c)

[33] In addressing the issue of major disturbance of land or waters, the native title party contentions (at 36 for P59/2025 and P59/2022, and at 41 for P59/2021) state that regard should be had to:

- the frequent use of each proposed licence and surrounding areas for worship, travel, hunting and gathering of bush tucker by the native title party;
- the use of each proposed licence area for the education of younger members of the native title party; and
- the existence of unregistered sites in each proposed licence area that are unknown to the grantee party.

[34] For P59/2021, the native title party also contends regard should be had to:

- the special significance that the Greenough River, waterholes and rock holes located within and around the area have for the native title party (at 41).

Grantee party contentions and evidence

s 237(a)

[35] For each of the proposed licences, the grantee party contends (at 1):

- It 'will notify the Traditional Owners prior to any prospecting activity likely to restrict the gathering of bush tucker, medicines and hunting of game and will consult with the Traditional Owners to minimise any disturbance';

- It does not propose to conduct any ground disturbing activities, will access the proposed licences via existing roads and tracks and will conduct prospecting activities on foot; and
- The area of the native title party's claim is 3,562,105.16 hectares and, given the proposed licences represent a very small encroachment, its activities are unlikely to interfere with the native title party's community and social activities.

[36] In relation to P59/2025, the grantee party also contends (at 1):

- 'At paragraph 8 of Mr Papertalk's affidavit [1] he says, inter alia, that the Mullewa Wajari community fish on the land. The Google Earth print at appendix "A" of the Grantee Party contentions shows a lack of water to support any marine life which brings into question the generality of clause 3 of the affidavit.'

s 237 (b)

[37] For each of the proposed licences, the grantee party contends (at 2) that it is 'very close to finalising negotiations with the Wajarri Yamatji claim group to protect Aboriginal Heritage'. It contends it will comply with the AHA and has never been prosecuted for any breaches in relation to the AHA. It also contends (at 4) that '[b]y offering to execute the Regional Standard Heritage Agreement the Grantee Party has demonstrated it is committed to take steps to protect Aboriginal heritage sites and will agree to have heritage surveys undertaken by Traditional Owners if required'.

s 237 (c)

[38] For each of the proposed licences, the grantee party contends (at 3) that it will access the proposed licences via existing roads and tracks, will conduct prospecting activities on foot without mechanised equipment and therefore will not exercise the full activities allowed under s 48 of the *Mining Act*. It contends any possible disturbance to land will be restored. For P59/2021 and P59/2022, it also contends 'With due respect to the Native Title party... the Native title Party contentions that 100 people and over 20 four wheel drive vehicles will cause far greater disturbance to the land than the Grantee Party's proposed prospecting on foot.'

Considering the Evidence in context of s 237 of the Act

Community or social activities (s 237(a))

- [39] The Tribunal is required under s 237(a) to make a predictive assessment of whether there is a real risk or chance that the grant of each proposed licence will directly interfere with the community or social activities of the native title party. The notion of direct interference involves an evaluative judgment of whether each proposed licence is likely to be the proximate cause of the interference, which 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 such as mining or pastoral activity that may have already affected the native title party's community or social activities (see *Smith v Western Australia* at [27]).
- [40] The Government party contends that: hunting and mineral exploration are, by their nature, inherently capable of coexistence; the Tribunal has found that to be the case on numerous occasions; and there is no particular or unusual evidence to indicate otherwise (all contentions at 40(f)). It also draws to the Tribunal's attention the grantee party's proposed activities which are to be conducted on foot and are not ground disturbing (all contentions at 40(a)). Finally, it contends the native title party's access to the proposed licences is unlikely to be prevented given the limited nature of rights held by a prospecting licensee (all contentions at 40(e)).
- [41] As noted above at [39], the evaluation of the likelihood of direct interference with community or social activities is a contextual exercise. In performing that exercise, the Tribunal is entitled to have regard to the previous and contemporary use of the land or waters and its effect on the activities identified by the native title party (see *Tullock v Western Australia* at [122]). The Tribunal's decision in *Champion v Western Australia* illustrates this point. In that matter, the Tribunal observed (at [64]) that, despite a long history of mining and pastoral activity in the area, there was no evidence these activities had had a detrimental effect on the native title party's community and social activities.
- [42] In the present case, there is evidence the land and waters have been subject to exploration interests over the last 30 years, and that P59/2025 is currently subject to a prospecting licence. As Member McNamara observed in *Western Desert v Teck*

Australia (at [123]), it does not necessarily follow from the grant of a mining tenement that exploration or mining has actually taken place. Nevertheless, it is reasonable to infer that the rights conferred on the holders of these tenements were exercised to some degree, if not to their full extent. There is no evidence that the exercise of these rights have had any effect on the community and social activities identified by the native title party, and given the proposed licences in this current inquiry are for prospecting, it is unlikely any prospecting activities would be greater than exploration activities.

[43] Similarly, the Tribunal is entitled to take into account the extent to which the identified community and social activities may be carried on over a wider area. In *Boddington v Bacome*, Deputy President Sosso found (at [44]) that evidence presented by the native title party over four inquiries indicated that the community and social activities were ‘carried out over [a] very wide geographic area’ (of which the act in question only comprised ‘a small fragment’). As the evidence did not establish that the land and waters concerned had greater importance for the activities than the surrounding country, Deputy President Sosso was not satisfied they were likely to be directly interfered with by the grant of the future act. In subsequent cases, the Tribunal has taken into account the size of the act relative to the claim area in determining the likelihood of direct interference with community and social activities (see for example *Cheinmora v Heron Resources* at [31]; *Wurrumurra v Ling* at [21]).

[44] The native title party’s submissions on interference with community or social activities are focused on the hunting weekends said to be carried on by members of the claim group in the proposed licences and elsewhere within the claim area. I note that seemingly identical evidence and contentions have been provided by the Tribunal in at least five other inquiries (see *Papertalk v Boadicea Resources*, *Papertalk v FMG Pilbara*, *Papertalk v Stokes*; *Papertalk v Top Iron*; and *Papertalk v Kennedy*). On this basis, it is reasonable to assume the activities identified are not unique to the proposed licences or specific to this inquiry and are undertaken in a much larger area.

[45] In the circumstances, taking into account the evidence before me and the matters previously considered by the Tribunal, I find the grants of the proposed licences are unlikely to directly interfere with the carrying on of the native title party’s community and social activities.

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 chance or risk of) interference with areas or sites of particular (that is, special or more than ordinary) significance to the native title party in accordance with its traditions. As noted above at [16], there are no registered sites or ‘other heritage places’ within P59/2022 and P59/2025, and a portion of the Greenough River mythological site overlaps P59/2021. However, the DAA 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.
- [47] In each of its contentions, the native title party states there are sites of significance within the proposed licences (Contentions for P59/2021 at 37-39, contentions for P59/2022 and P59/2025 at 32-34). However, the only evidence provided by the native title party in relation to s 237(b) is for P59/2021 via Mr Papertalk’s affidavit 2. Mr Papertalk refers to the significance of the Greenough River and its many associated waterholes and rock holes generally located ‘in and around the tenement area’ (at 25). More specifically, he refers to a hill with a waterhole named *Ngunaraa* (at 27). It is unclear whether *Ngunaraa* is located on P59/2021.
- [48] The identification of areas or sites of particular significance is a precondition to the inquiry under s 237(b) (see *Yindjibarndi v FMG Pilbara* (at [125])). As information about areas or sites of this kind is peculiarly within the knowledge of the relevant native title holders, any failure on the part of the native title party to produce evidence about their existence may lead the Tribunal to draw an unfavourable inference in the application of its common sense approach to the evidence (see *Ward v Western Australia* at [24]). In previous matters, the Tribunal has held that, where a native title party asserts that an area or site is one of particular significance, the area or site must be identified and the nature of its significance explained (see *Silver v Northern Territory* at [91]).
- [49] The evidence of the native title party relates to P59/2021 only and outlines, in general terms, the significance of the Greenough River, its associated waterholes and rock holes, and their connection with the *Bimbara* dreaming story and the spirits of the

native title party's ancestors. The Tribunal has heard evidence and contentions to this effect in previous matters (see for example *Papertalk v Boadicea Resources* at [21], [42]; *Papertalk v Stokes* at [23], [36]; and *Papertalk v Top Iron* at [31], [46]).

- [50] In its contentions for P59/2021, the Government party states that 'an area or site of particular significance' must mean an area which stands out in some way from the general background of other sites and the country as a whole. It submits that general evidence which can be said to fit into a generic category such as a waterhole is not sufficient to establish that an area or site is of particular significance. In any event, it submits the proposed conditions and regulatory regimes relating to waterways control matters pertaining to water, and there is no evidence to displace the assumption that the grantee will act in accordance with the conditions and regimes.
- [51] I accept that water bodies such as lakes, watercourses, pools and holes are generally significant to the Mullewa Wadjari community. However, the evidence of Mr Papertalk does not identify any specific features within any of the proposed licences that might fit the description of an area or site of particular significance. The only feature specifically identified by Mr Papertalk is a waterhole named *Ngunaraa*, but there is no evidence as to how this waterhole stands out from any of the many waterholes or rock holes he attests are located in P59/2021 and along the Greenough River generally. Also, as noted earlier, it is not clear whether *Ngunaraa* is on the proposed licence.
- [52] Mr Papertalk also deposes to the existence of 'many artefacts' located along the Greenough River. While I understand these areas are important to the Mullewa Wadjari, I am not satisfied, based on the evidence provided in this matter, that any of them are areas or sites of particular significance within the meaning of s 237(b).
- [53] As the evidence does not establish the existence of areas or sites of particular significance in the proposed licences or surrounding areas, I am not in a position to consider whether the grants are likely to interfere with areas or sites of this kind. Nonetheless, to the extent the evidence suggests the possible existence of sites which are significant to the native title party, I am satisfied that interference would be unlikely given the grantee party is willing to enter into an RSHA with the native title party, does not intend to undertake ground-disturbing activities, and the Government

party has proposed the RSHA condition for each of the proposed licences. This should ensure that any significant areas or sites are identified and appropriate steps are taken to avoid interference.

[54] The native title party seeks to draw on the example of damage that has allegedly occurred at the Tallering Peak site and along the Greenough River generally to illustrate the inadequacy of the site protection regime. These matters have no apparent connection with the grantee party and there is nothing specific which has been provided to make these relevant to this inquiry. The Tribunal has previously taken note of findings regarding weaknesses in the monitoring and enforcement of heritage conditions in Western Australia (see *Karajarri Traditional Lands Association v ASJ Resources* at [43]-[53]; *Barnes v Pirkopf* at [27]-[31]). However, it was also accepted in those matters that the conduct of individual land users should not necessarily be imputed to others (see especially *Karajarri Traditional Lands Association v ASJ Resources* at [91]; *Barnes v Pirkopf* at [31]). In the present matter, the grantee party has stated it is aware of its obligations under the AHA, and there is nothing to suggest it will not comply with them.

[55] Taking these matters into account, I find the grants of the proposed licences are not likely to interfere with areas or sites of particular significance in accordance with the traditions of the native title party.

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

[56] The task of the Tribunal in relation to s 237(c) of the Act is to determine whether there is a real chance or risk of major disturbance to land and waters. The term ‘major disturbance’ is to be given its ordinary English meaning as understood by the whole Australian community, including Aboriginal people (see *Little v Oriole Resources* at [52]-[54]). The concerns of the Aboriginal community including matters such as community life, customs, traditions and cultural concerns are relevant to evaluating the degree of disturbance; however, the concerns must relate to direct, physical disturbance arising from the act or any rights created by it (see *Cosmos v Croydon Gold* at [29]).

[57] The native title party contends the Tribunal should have regard to: the significance of the Greenough River and associated water holes located in P59/2021; the frequent use

of the proposed licences and the surrounding areas for travel and hunting and gathering by members of the Mullewa Wadjari community; the use of the area for the education of younger members of the community; and the existence of unregistered sites that are unknown to the grantee party.

[58] The Government party contends (at 62 for P59/2021, at 59 for P59/2022 and at 58 for P59/2025) that the grant of each proposed licence is not likely to involve major disturbance relevant to s 237(c) of the Act because:

- the grantee party has stated the prospecting activities will not constitute major disturbance and will be conducted on foot without mechanised equipment;
- the exercise of rights conferred by each proposed licence will be regulated by the State's regulatory regimes with respect to mining, Aboriginal heritage and the environment. It is likely these regimes will together and separately avoid any major disturbance to land and waters;
- any authorised disturbance to land and waters caused by the grantee party may be mitigated pursuant to proposed conditions requiring rehabilitation of the land following completion of exploration;
- the area of each proposed licence has been subject to prior mineral exploration and mining activity, and is covered by a pastoral lease. The activities contemplated by the grantee party would be the same as, or no more significant than, the previous and continuing use of the area; and
- it does not appear the proposed licences have any particular characteristics that would likely result in major disturbance to land and waters given the activities proposed by the grantee party.

[59] In relation to the use of the area by members of the Mullewa Wadjari community for various purposes, I have already concluded the grantee party activities on the proposed licences are unlikely to directly interfere with the community and social activities of the native title party. To the extent the native title party's contentions rely on assertions about the existence of unspecified sites, I am unable to conclude on this

basis that the proposed licences are likely to involve major disturbance for the purposes of s 237(c).

[60] In evaluating the risk of major disturbance, I have also had regard to the following:

- the area of the proposed licences is subject to pastoral leasehold. It is likely that disturbance has already occurred in these areas;
- the proposed licences will be subject to conditions requiring the grantee party to rehabilitate all disturbances to the surface of the land made as a result of exploration and the removal of all waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings at the end of the exploration program; and
- there is no evidence the grantee party is likely to fail to comply with the relevant regulatory regimes.

[61] Taking all of these considerations into account, I find the grants of the proposed licences are not likely to involve major disturbance to the land and waters concerned.

Determination

[62] The determination of the Tribunal is that the acts, namely the grants of prospecting licences P59/2021, P59/2022 and P59/2025 to Kalamazoo Resources Pty Ltd, are acts attracting the expedited procedure.

Helen Shurven
Member
7 November 2014