# NATIONAL NATIVE TITLE TRIBUNAL

***Gooniyandi Aboriginal Corporation Registered Native Title Body Corporate v Western Barite Pty Ltd and Another*** **[2014] NNTTA 99 (9 October 2014)**

**Application No:** **WO2013/0785**

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

- and -

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

**Gooniyandi Aboriginal Corporation Registered Native Title Body Corporate (WCD2013/003) (native title party)**

- and -

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

- and -

**Western Barite Pty Ltd (grantee party)**

**DETERMINATION THAT THE ACT IS NOT AN ACT ATTRACTING THE EXPEDITED PROCEDURE**

**Tribunal:** Helen Shurven, Member
**Place:** Perth
**Date:** 9 October 2014

**Catchwords:** Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act is likely to interfere directly with the carrying on of community or social activities – whether act is likely to interfere with sites of particular significance – whether act is likely to involve major disturbance to land or waters – determination area – native title exists – exclusive possession – expedited procedure is not attracted

**Legislation:** *Native Title Act 1993* (Cth), ss 29, 31, 32, 47, 56, 151(2), 237
*Mining Act 1978* (WA)
*Aboriginal Heritage Act 1972* (WA)

**Cases:** *Andy Campbell and others on behalf of the Birriliburu Native Title Holders/Western Australia/Murchison Metals Ltd* [2012] NNTTA 48 (‘*Andy Campbell v Murchison Metals Ltd*’)

*Banjo Wurrunmurra and others on behalf of Bunuba/ Western Australia/ Francis Robert Salmon and Jamie Dean Duffield* [2012] NNTTA 27 (‘*Bunuba v Western Australia*’)

*Monadee v Western Australia* (2003) 174 FLR 381; [2003] NNTTA 38 (‘*Moondee v Western Australia*’)

*Gooniyandi Aboriginal Corporation Registered Native Title Body Corporate v Western Australia and Another* [2014] NNTTA 89 (‘*Gooniyandi v Western Australia*’)

*HL (Name witheld for cultural Reasons) and Others (Warrwa #2) v 142 East Pty Ltd* [2014] NNTTA 49 (‘*Warrwa #2 v 142 East Pty Ltd*’)

*John Watson and Others on behalf of Nyikina Mangala/Western Australia/Brockman Exploration Pty Ltd* [2013] NNTTA 35 (‘*Watson v Brockman Exploration Pty Ltd*’)

*Little v Oriole Resources Pty Ltd* (2005) 146 FLR 576; [2005] FCAFC 243 (‘*Little v Oriole Resources*’)

*Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon* [2006] NNTTA 65 (‘*Martu Idja Banyjima v Western Australia*’)

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

*Sharpe v State of Western Australia* [2013] FCA 599 (‘*Sharpe v Western Australia*’)

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

*Tullock and Others v Western Australia and Another* (2011) 257 FLR 320; [2011] NNTTA 22 (‘*Tullock v Western Australia*’)

*Western Australia v Glen Derrick Councillor and Others on behalf of the Naagaju Peoples; Leedham Papertalk and Others on behalf of the Mullewa Wadjari Community v Bayform Holdings Pty Ltd* [2010] NNTTA 41 (‘*Councillor and Papertalk v Bayform Holdings Pty Ltd*’)

*Western Desert Lands Aboriginal Corporation (Jamukurnu Yapalinkunu) RNTBC v Teck Australia Pty Ltd* [2014] NNTTA 56 (‘*WDLAC v Teck Australia*’)

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

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| **Representative of the native title party:** | Ms Barbra Friedewald, Kimberley Land Council |
| **Representatives of the Government party:** | Ms Caitlin Brandstater, State Solicitor’s Office<br>Mr Matthew Smith, Department of Mines and Petroleum |
| **Representative of the Grantee party:** | Ms Lydia Brisbout, McMahon Mining Title Services Pty Ltd |

**REASONS FOR DETERMINATION**

[1] On 17 June 2013, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act', 'NTA') of its intention to grant exploration licence E04/2303 ('the proposed licence') to Western Barite Pty Ltd ('the grantee party'). The notice included a statement that the Government party considers the grant attracts the expedited procedure (that is, the proposed licence 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 day' was specified as 19 June 2013.

[2] The s 29 notice describes the proposed licence as comprising seven graticular blocks (approximately 22 square kilometres) with a centroid of 18$^{o}$ 36' S, 125$^{o}$ 58' E, located 63 kilometres south-easterly of Fitzroy Crossing, in the Shire of Halls Creek.

[3] An objection to the inclusion of the expedited procedure statement may be made to the National Native Title Tribunal ('the Tribunal') within 4 months of the 'notification day' (see s 32(3) of the Act). As explained by ss 32(3) and s 30(1)(a) and (b), the objection may be made by either:

a) any registered native title body corporate ('RNTBC') in respect of the relevant land or waters who is either (i) registered as an RNTBC at 3 months after the notification day, or, (ii) if the RNTBC is registered after that three month period, the RNTBC has resulted from a claim that was registered before the end of three months from the notification day; or

b) any registered native title claimant in respect of the relevant land or waters who is registered at four months from the notification day provided the claim was filed before the end of three months from the notification day.

[4] The notification date for this matter was 19 June 2013. The three month period for filing a native title claim was 19 September 2013. The four month period for lodgement of objections was 19 October 2013. By the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth) the closing date for lodging an objection became 21 October 2013, the next working day.

[5] The proposed licence is wholly overlapped by the Gooniyandi Combined native title determination (WCD2013/003, WAD6008/2000, determined 19 June 2013), with the RNTBC being the Gooniyandi Aboriginal Corporation (*Sharpe v Western Australia*).

As a result of that determination, exclusive native title exists over the whole of the proposed licence.

[6] On 17 July 2013, the Gooniyandi Aboriginal Corporation ('the native title party') lodged an objection to the expedited procedure application in relation to the proposed licence. On 1 August 2013, the application was accepted by the Tribunal. On 24 October 2013 I was appointed as the Member to constitute the Tribunal.

[7] On 5 November 2013, a preliminary conference was held at which the grantee and native title party representatives advised they wished to negotiate an agreement, and requested an adjournment to allow time to do so. At the first status conference on 5 March 2014, the grantee party representative advised they were reviewing all of its tenure applications in the region and requested further time to confirm instructions. At the second status conference held on 26 March 2014, the grantee party representative advised they had not been able to obtain instructions from the grantee party and requested additional time. At the third status conference held on 9 April 2014, the grantee party representative again advised they had not been able to obtain instructions from the grantee party. Given the time already provided to the grantee party, I set directions for parties to lodge submissions for an inquiry into the objection application. The directions still provided the parties some 14 weeks to negotiate an agreement before a listing hearing would be held on 17 July 2014.

[8] In accordance with the directions, the Government party initial evidence was received on 30 April 2014, through the Department of Mines and Petroleum ('DMP'). Following a request from the native title party for an extension to directions, the native title party submissions were lodged on 18 June 2014, the grantee party submissions on 2 July 2014, the Government party contentions on 25 July 2014, and the native title party reply on 25 July 2014.

[9] On 5 August 2014, each of the parties' representatives agreed via email they had no further submissions and the matter could proceed to be heard 'on the papers' in accordance with s 151(2) of the Act.

[10] A map and an overlap analysis of the proposed licence prepared by the Tribunal's Geospatial Unit were circulated to parties on 22 August 2014. No party objected to the Tribunal using the map or the overlap analysis in the course of this inquiry.

[11] I have reviewed the material before the Tribunal and I am satisfied the matter can be adequately determined 'on the papers', in accordance with s 151(2) of the Act.

## Legal principles

[12] Section 237 of the Act provides:

> **237 Act attracting the expedited procedure**
>
> A future act is an ***act attracting the expedited procedure*** if:
>
> (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and
>
> (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and
>
> (c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

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

## Evidence in relation to the proposed act

[14] The Government party provided the following documents relating to the proposed licence:

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

[15] The DMP Quick Appraisal notes the entire area of the proposed licence is overlapped by Mt Pierre Indigenous held pastoral lease (I 398/806). According to *Sharpe v Western Australia* (at [5] schedule 3), exclusive native title exists over Mt Pierre Indigenous owned lease.

[16] According to the DMP Quick Appraisal, 100 per cent of the proposed licence falls within the West Kimberley National Heritage Listing (West Kimberly 106063). Other notable interests in the Quick Appraisal are:

- Department of Water, Ground Water Area 10 overlapping at 100 per cent; and
- Department of Water, Surface Water Area 15 (Fitzroy River and Tributaries) overlapping at 100 per cent.

[17] The DMP Quick Appraisal shows no current or pending mineral tenure over the proposed licence. Previous mineral tenure granted prior to the commencement of the Act is as follows:

- Two surrendered mining leases held from 1990 to 1993 overlapping 34.9 and 2.6 per cent respectively;
- Three surrendered or expired exploration licences held from 1983 to 1984, 1985 to 1990 and 1991 to 1993 overlapping at 75.9, 100 and 2.5 per cent respectively;
- 32 surrendered mineral claims, held for no more than four years between 1972 and 1983, overlapping between 0.2 and 5.5 per cent each respectively; and
- One cancelled temporary reserve held from 1920 to 1921 overlapping at 100 per cent.

Previously granted mineral tenure notified under the Act but prior to the registration of the native title party's claim application (Gooniyandi Combined #2 WC2000/010, registered from 23 April 2001 until determined on 19 June 2013) is:

- E04/1032 held from 1996 until expiry in 2007, overlapping at 100 per cent.

Previously granted mineral tenure notified under the Act following the registration of the native title party's claim application is:

- E80/3633 granted in 2007 and surrendered in 2008 overlapping at 85.7 per cent. Tribunal records show objection application WO2006/0576 was lodged by the registered native title claimant for the native title party's claim on 6 November 2006 and was withdrawn on 15 June 2007 via an agreement with the grantee party for that matter.

[18] The DMP Quick Appraisal indicates the proposed licence contains the following services:

- Two undeveloped prospects (Longs Well 1 and 3);
- One non perennial major watercourse; and
- Three non perennial minor watercourses

[19] The report from the DAA Database shows no registered sites within the proposed licence. According to the grantee and native title party submissions, and mapping prepared by the Tribunal, one 'other heritage place' overlaps part of the proposed licence, being Gap Creek (DAA ID 13222).

[20] According to mapping prepared by the Tribunal, Galuru Gorge Aboriginal Community located at Mount Pierre Homestead lies approximately 8 kilometres east of the proposed licence. Four other Aboriginal communities are located some 10 to 15 kilometres south of the proposed licence (including Mimbi and Ngumpan and Mingalkala).

[21] The Draft Tenement Endorsement and Conditions Extract indicates the proposed licence will be subject to the standard four conditions imposed on the grant of all exploration and prospecting licences in Western Australia (see *Tullock v Western Australia* at [11]-[12]), as well as two standard conditions imposed for licences overlapping pastoral or grazing leases. These are:

> 1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion;
>
> 2. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP;

3. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program;

4. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.

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.

[22] The following draft endorsements (which differ from conditions in that the licensee will not be liable to forfeit the licence if breached) are also noted:

1. The Licensee's attention is drawn to the provisions of the *Aboriginal Heritage Act 1972* and any Regulations thereunder.

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

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

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

4. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.

5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the DoWs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.

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

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

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

7. Advice shall be sought from the DoW if proposing any exploration within a defined waterway and within a lateral distance of:

   - 50 metres from the outer-most water dependent vegetation of any perennial waterway; and
   - 30 metres from the outer-most water dependent vegetation of any seasonal waterway.

**In respect to Proclaimed Surface Water Areas (Fitzroy River and Tributaries) the following endorsements apply:**

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

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

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

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

**In respect to Proclaimed Ground Water Areas (Canning-Kimberley) the following endorsement applies:**

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

## Submissions of the native title party

[23] The native title party provides submissions relating to s 237(a) and (b) only which comprise: a statement of contentions; the affidavit of Ms Rosemary Nugget sworn 13 June 2014; the affidavit of Mr Malachy Hobbs sworn 13 June 2014; the affidavit of Mr Angus 'Hector' Hobbs sworn 20 May 2014; and the affidavit of legal officer Ms Barbra Friedewald sworn 16 June 2014. Annexed to the affidavits of Ms Nugget, Mr M Hobbs and Mr A Hobbs are topographical maps showing the location of the proposed licence. Annexed to Ms Friedewald's affidavit is a map entitled 'Gooniyandi Rangers Fire Operations Mt Pierre 2014'.

[24] Ms Nugget states she is the Community Chairperson of Mimbi Community located on Mount Pierre pastoral lease, and identifies as Gooniyandi via her mother and great grandmother. Ms Nugget states she is a Director of the Gooniyandi Aboriginal Corporation 'and under our Law I have authority to speak about Gooniyandi land matters' (at 4). Mr M Hobbs identifies himself as a 'Gooniyandi/Walmajarri mixed man' whose mother was a Gooniyandi woman and '[u]nder our law I have authority to speak about land matters within the Gooniyandi claim area' (at 3). Mr A Hobbs states he is 'a member of the Gooniyandi Native Title Holders' (at 1) and the information he provides is drawn from his own knowledge 'together with Gooniyandi Elders Don

Gilligan, Thomas Dick and Doris Docherty' (at 2). As such I accept each of Ms Nugget, Mr M Hobbs and Mr A Hobbs have authority to speak on behalf of the native title party for the country which is subject to the proposed licence.

[25] I accept the affidavit of Ms Friedewald, who, in her capacity as the native title party's legal representative, has obtained information concerning the native title party's 'care for country' programme, notably the document entitled 'Gooniyandi Rangers Fire Operations Mt Pierre 2014' which is annexed to her affidavit and appears to have been prepared by members of the native title party. The Tribunal, in carrying out it functions, is not bound by the rules of evidence (s 109).

**Submissions of the grantee party**

[26] The grantee party makes substantial contentions in reply to the native title party's contentions and evidence relating to s 237(a) and (b) which will be addressed below. With regard to s 237(b), the grantee party states it is willing to enter into a Regional Standard Heritage Agreement with the native title party, is aware of its obligations under the *Aboriginal Heritage Act* ('AHA'), and has never been prosecuted under the AHA or accused of breaching the AHA. The grantee party does not address s 237(c) in any detail.

**Submissions of the Government party**

[27] The Government party makes contentions relating to s 237(a) and s 237(b), which will be addressed further in this decision.

## Considering the Evidence

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

[28] The Tribunal is required to make a predictive assessment as to whether the grant of the proposed licence and activities undertaken pursuant to it are likely to interfere with the community or social activities of the native title party (in the sense of there being a real risk of interference) (see *Smith v Western Australia* at [23]). Direct interference involves an evaluative judgement 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]).

[29] The grantee party states it 'plans to undertake the usual activities associated with exploration licences' and contends exploration work is of a 'low-level, temporary nature' (citing *Martu Idja Banyjima v Western Australia* at [30]). Whilst it lists what it contends are the 'usual activities', the grantee party provides no detailed information regarding the particular exploration work planned for the proposed licence. Therefore, it is open for me to infer the grantee party will exercise their rights under the *Mining Act* to the full (see *Silver v Northern Territory* at [25]-[32]; *Monadee v Western Australia* at [17]) and I do make that inference.

[30] The full scope of activity to which the grantee party is entitled under the grant of an exploration licence is set out in s 66 of the *Mining Act:*

> An exploration licence, while it remains in force, authorises the holder thereof, subject to this Act, and in accordance with any conditions to which the licence may be subject –
>
> (a) to enter and re-enter the land the subject of the licence with such agents, employees, vehicles, machinery and equipment as may be necessary or expedient for the purpose of exploring for minerals in, on or under the land;
>
> (b) to explore, subject to any conditions imposed under section 24, 24A or 25, for minerals, and to carry on such operations and carry out such works as are necessary for that purpose on such land including digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for the purpose in, on or under the land;
>
> (c) to excavate, extract or remove, subject to any conditions imposed under section 24, 24A or 25, from such land, earth, soil, rock, stone, fluid or mineral bearing substances in such amount, in total during the period for which the licence remains in force, as does not exceed the prescribed limited, or in such greater amount as the Minister may, in any case, approve in writing;
>
> (d) to take and divert, subject to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act water from any natural spring, lake, pool or stream situate in or flowing though such land or from any excavation previously made and used for mining purposes and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with exploring for minerals in the land.

[31] The *Mining Regulations 1981* (WA) outline the amount of material able to be removed from the exploration licence:

> **20. Limit on amount of earth etc. that may be removed (Act s. 66(c))**
>
> For the purposes of section 66(c) [of the Mining Act], the limit on the amount of earth, soil, rock, stone, fluid or mineral bearing substances which may be excavated, extracted or removed during the period for which the licence remains in force is 1 000 tonnes in total, and the excavation, extraction or removal of a larger tonnage, without the Minister's written approval, shall render the licence liable to forfeiture.

[32] My assessment of s 237(a) must be contextual, taking into account factors that may already have impacted on the native title party's community or social activities (such as mining or pastoral activity) (see *Smith v Western Australia* at [27]). In this matter, there has been some mineral tenure granted over the area in the past. However, no evidence has been led as to what that activity, if any, was or was likely to be conducted, or where such may have occurred on the proposed licence. The native title party have not indicated that any previous exploration or mining activity has interfered or impeded their social or community activities in relation to this proposed licence.

[33] As noted, the DMP quick appraisal shows the proposed licence is entirely overlapped by Mt Pierre Indigenous owned lease. In this area the native title party holds 'an entitlement as against the whole world to possession, occupation, use and enjoyment of the land and waters of that part to the exclusion of all others' by operation of s 47 of the Act ('exclusive native title') (*Sharpe v Western Australia* at [5], schedule 3). The Tribunal has held that native title parties may have greater ongoing access to areas which are covered by an indigenous held lease than areas subject to other pastoral interests (see for example *Bunuba v Western Australia* at [52]-[53]). In that matter, the Tribunal found the usual risk assessment factors of the ongoing lawful activities of pastoralists prevailing over native title rights did not automatically occur, but still noted the importance of the native title party's evidence regarding s 237(a).

[34] Mr A Hobbs' evidence relating to community and social activities is as follows:

- 'The exploration licence area is located approximately thirty minutes' drive from Nimbi [*sic* – Mimbi] Aboriginal Community, where three or four Gooniyandi people families are living. It is the main place where those families go hunting and fishing, both because other places are further away, and because the exploration licence area is so good for those activities: there is a fresh-water spring in the vicinity of the exploration licence area, which makes it great for emus "in the wet". It is great for fishing as well, especially perch. The exploration licence area is also good for kangaroo and bush turkey' (at 3);

- 'Those families go hunting and fishing there at least once a week, and use those trips as an opportunity to pass on Gooniyandi law and culture to the younger people' (at 3);

- ‘As a fishing area, it is particularly important, because under Gooniyandi law, when a person dies, their close relatives have to go on a fish diet (meaning no red meat) until after the funeral, and the exploration licence area is where they catch the fish that they eat during that mourning period’ (at 3)

- ‘Other Gooniyandi people go hunting and fishing in the exploration licence area as well, including Jimmy Shandley and his family’ (at 3);

[35] Ms Nugget’s evidence relating to community and social activities is as follows:

- Member of Ms Nugget’s family ‘go out to the exploration license area all through the year except when Mt Pierre is doing their muster…to hunt kangaroo and bush turkey. The [Saddler] ridge is especially good to hunt for rock wallabies, pythons and echidnas’ (Affidavit of Ms Nugget at 11-12);

- Ms Nugget’s family ‘go out near or on the area about twice a week. Last week my husband and son went into the exploration license area and brought back four bush turkeys, and three kangaroos. They cooked the gizzard and wings where they caught them and then brought the rest of the birds and kangaroo back to Mimbi’ (at 14-15);

- ‘My family collects bush tucker on the exploration license area mainly: *konkerberry* and *brielee* (March, April May), *geeindy* (after the wet season). *Geeindy* grows on the rocky area…on the Ridge’ (at 18); ‘My children’s favourite activity on the exploration license area is to climb up onto Saddler Ridge and collect the *geeindy*’ (at 20);

- ‘I collect products on the exploration license area to make bush medicines such as bloodwood red sap, which we use on sores, *lumpy lumpy* is good for skin rashes and boils, we boil the branches and then apply the liquid broth to the area (at 19);

- ‘When we take our children onto the exploration license area, we teach them about the story for their country and about all the different products which we find in the exploration license area’ (at 20); and

- The Gooniyandi rangers ‘at different times help Gooniyandi people to care for country…and encourage this country’s native vegetation to thrive’ (at 21).

[36] With regard to the Gooniyandi rangers activities, Ms Friedewald, the native title party's legal representative deposes:

- 'I had discussions with Ewan Noakes in early May and again on occasions during the week beginning 9 June about [Gooniyandi] Ranger activity which has taken place in the exploration license area this year. On 16 May Ewan provided me with a map of burning activities that the NTP [native title party] had planned and executed in the material area through their proactive 'care for country' program…During discussion on 15 May Ewan confirmed that extensive weeding program had also taken place in the material Area this year. Ewan identified to me during the discussion on 15 May that the NTP [native title party] participated in the above mentioned [Gooniyandi] Ranger programs' (at 5-7)

Annexed to Ms Friedewald's affidavit is a satellite imagery map bearing the Gooniyandi Rangers logo and entitled 'Gooniyandi Rangers Fire Operations Mt Pierre 2014'. The map shows a number of yellow dots where fuel reduction burning took place, three of which appear to lie within the proposed licence.

[37] With reference to the native title party's evidence regarding fishing, the grantee party contends the mapping 'shows a number of rivers located in the vicinity of the Tenement. As such the Grantee party respectfully submits that while the NTP may undertake regular fishing activities within the Tenement, these activities are likely to be undertaken more widely within the Determination area, as well as more widely within the vicinity of the Tenement' (at 43). The grantee party also refers to the Government party's proposed endorsements relating to waterways to contend it is unlikely to interfere with the native title party's fishing activities, notably endorsements 7, 8, 9 and 10 which: require advice from the Department of Water if work is proposed within 30 or 50 metres of any seasonal or perennial waterway; and prohibit any abstraction, obstruction or interference unless a licence is first obtained (at 44-46). However, unlike the proposed conditions, the grantee party is not liable to forfeit the proposed licence should they breach any of the proposed endorsements.

[38] With reference to the collection of bush tucker and medicine, the grantee party contends 'no evidence has been provided by the NTP that these activities and foods are not also conducted generally and available on land outside of the Tenement area' and 'little evidence has been provided as to how the activities of the Grantee Party are likely to cause direct significant interference with these activities' (at 47-49). The grantee

party contends the impact of any overlap between its activities and those of the native title party 'would be relatively insignificant where such activities could be readily undertaken in other parts of the Tenement area or the Determination area' (at 50). The grantee party makes the same contentions regarding the native title party's hunting activities (at 51-52). Both the Government party and grantee party contend hunting and mineral exploration activities are, by their very nature, inherently capable of coexistence (grantee party at 53-57, Government party at 43 (g)). The Government party contends the Tribunal has on numerous occasions found that to be the case and has determined the grant of an exploration licence is not likely to interfere with hunting. It contends '[i]n the absence of particular and very unusual evidence suggesting otherwise (there is none in this case) it should do here' (a 43(g)).

[39] The focus of the s 237(a) inquiry are the consequences of the grant of the proposed licence on the carrying on of community or social activities of the native title party, who in this instance hold exclusive native title rights over the area of the proposed licence. The activities must be of a community or social nature, not necessarily limited to a localised community and the interference must be substantial in nature. As summarised by President Webb QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara*, 'there needs to be quantifiable evidence before the Tribunal of ongoing community and social activities on, or having a nexus with, the relevant area in order to assess whether there is a real risk of those activities being adversely affected by the exploration activities if the grant is made' (at 59).

[40] I agree with the grantee party and Government party that the grantee party activities, even were they to be exercised to their full extent, are unlikely to interfere substantially with any of the activities evidenced by the native title party as there is no evidence to suggest the activities could not be temporarily conducted elsewhere on the proposed licence or in the general vicinity of Sadler Ridge. There is not a lot of evidence to suggest that these activities could not also occur elsewhere on Mt Pierre lease or the wider determined area (which I note is over 11,000 square kilometres in total).

[41] In making my decision I have compared the level of evidence provided by the native title party in this matter to that provided in *Gooniyandi v Western Australia* (at [52]-[58]). In that matter, I considered *Silver v Northern Territory* (at [57]), where it was stated that 'it would not be enough if only isolated members of a community were upset about the proposed future act. There would have to be evidence that the doing of the act

would be likely to substantially interfere with the community or social activities of the native title holders'. In *Gooniyandi v Western Australia*, I found the evidence indicated intensive and regular use of the area for fishing by many members of the native title party who reside in a number of communities all located within easy travelling distance of the area. There was no evidence that any other fishing areas were used by the native title party in such an intensive way. In this matter, the evidence indicates the proposed licence is mainly used for fishing and hunting by 'three or four Gooniyandi people families' residing in Mimbi Aboriginal community. It appears intensive use for fishing by these families would occur only on an occasional basis if a member of the native title party passes away and the family must 'go on a fish diet...until after the funeral' (Affidavit of Mr A Hobbs at 3). Although other members of the native title party also use the area for fishing, there is not sufficient evidence to indicate the proposed licence is utilised by the wider native title party in the intensive and regular way described in *Gooniyandi v Western Australia* (at [52]-[58]).

[42] In *Gooniyandi v Western Australia* (at [52]-[58]), I concluded there was insufficient evidence to indicate the social and community activities of the native title party would be interfered with in relation to: looking after sites, some plant gathering activities (which were not necessarily restricted to that proposed licence) and the hunting of goannas (which I also could not say was isolated to or done in an intensive way on that particular proposed licence). In this matter, I make a similar finding in relation to the hunting and gathering activities described in the evidence. In relation to the activity of passing intergenerational knowledge, there is no evidence to indicate this activity occurs only on the area of the proposed licence. Rather, it appears to occur in conjunction with the activities of hunting and gathering (Affidavits of Ms Nugget at 20 and 22, Mr A Hobbs at 3).

[43] Finally, in relation to the community and social activities of burning, weeding and other 'care for country' activities, I am informed by *WDLAC v Teck Australia*. In that matter, the evidence indicated the various 'care for country' activities (including burning) were conducted via a ranger programme similar to the programme evidenced in this matter. Member McNamara concluded 'they are nonetheless activities of a communal or social nature, given their broader religious and social function' (at 77) and I make the same conclusion here. However, what distinguishes *WDLAC v Teck Australia* from this matter is that the evidence in *WDLAC v Teck Australia* suggested burning occurred over large areas rather than a number of small targeted areas. Furthermore, members of

that native title party specifically expressed concern both for the safety of the grantee party in that matter and for the regeneration of their 'bush tucker' if burning did not occur (at [78]-[79]). On the balance of the evidence, and with reference to the regime under the *Bush Fires Act 1954* (WA), Member McNamara was not satisfied the regime would minimise the risk to that grantee party and, in turn, the risk of interference with traditional burning activities (at [83]). The evidence in this matter is not sufficient to make the same conclusion.

[44] Based on the evidence, I am satisfied it is unlikely the grant of the proposed licence would directly and substantially interfere with the conduct of the social and community activities of the native title party in this area.

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

[45] In relation to s 237(b), the issue the Tribunal is required to determine is whether there is likely to be (in the sense of a real chance or risk of) interference with areas or sites of particular (that is, more than ordinary) significance to the native title party in accordance with their traditions. As stated above at [19], the DAA Database shows no registered sites within the proposed licence. Both the grantee party and the native title party note there is one 'other heritage place' called 'Gap Creek', which, according to Tribunal mapping, overlaps the southern half of the proposed licence. This evidence does not mean there are no other sites or areas of particular significance to the native title party within the proposed licence or in the vicinity. The Register of Aboriginal Sites 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.

[46] Mr M Hobbs' affidavit deposes to two sites within the proposed licence:

- 'There is a significant old ceremony place in the exploration license area. We don't have a name for the significant site other than Budgerdi, Gooniyandi know which cave in Budgerdi is the significant cave which women are not allowed to go to. Men/strangers to country can only go there with senior Gooniyandi men and after a smoking ceremony. Even if the strangers to country go with the old men and are smoked they still cannot touch anything in the cave area or disturb the ground around the cave. Women have to stay further away from the cave it has a big buffer area for them…The ceremony place on the exploration license

area is where the dreamtime serpent Galaroo (who had created all of the landforms in this Gooniyandi area, he chose to live in this cave, although he still travels sometimes) lives, it has special living water and also there are significant paintings in the cave. There is a different song for this old ceremony place than the other places' (at 7 and 10); and

- 'There is a significant burial place on the exploration license area which is less than a kilometre away from the cave but it is not too close. There are two bloodwood *koondaboonu* trees…which signify the main significant burial place. The old people from a long time ago are buried there in the ground…Where the burial place is you can talk to the Gooniyandi ancestors you have to talk in Gooniyandi language and you have to show respect to those people who passed away…Anytime we take our families out to this burial place we need to…act in the proper way, sit down and cry the respectful way… This place is very significant to communicate with our Gooniyandi old people and ancestors… Under Gooniyandi law our ancestors burial places cannot be disturbed' (at 13-16)

[47] Mr M Hobbs' evidence indicates the native title party are obliged to care for the above sites by ensuring proper ceremony is undertaken when entering the sites. Mr M Hobbs' evidence indicates both sites are potentially dangerous, and the native title party have a 'responsibility for keeping strangers safe on country and by keeping strangers away from our dangerous places, trying to keep them safe' (at 18). In relation to the ceremonial cave, any man entering the cave must be accompanied by senior Gooniyandi men and undertake a smoking ceremony prior to entry (at 7). For women, Mr M Hobbs states the area has a 'big buffer' around it. In relation to the burial place, Mr M Hobbs deposes '[w]e know of people who have been haunted by the ancestors forever for going to these places, other people have gone mad or their family have gotten sick... There are spirits of the Mulbarn magic men in the burial place...[who] will haunt the person who went there without proper ceremony and welcome to country from the old people' (at (16)-(17)).

[48] Mr M Hobbs' evidence regarding the sites is supported by Mr A Hobbs, who attests to visiting the area of the proposed licence on the day his affidavit was sworn 'together with Gooniyandi Elders Don Gilligan, Thomas Dick and Doris Docherty' (at 2):

- 'Gooniyandi and Walmajarri people used to conduct ceremony together within the exploration licence area, long time. It is no longer used for ceremony, but the

> old burial ground remains a particularly significant area to Gooniyandi people...people would need to come and talk to us, before they started any exploration there. They would need to take senior Gooniyandi men with them, to introduce them to that place, to tell them what to do and what not to do, what they can't touch' (at 4).

[49] In support of these arguments, the native title party contentions (at 45) raise the argument as outlined in *Campbell v Murchison Metals Ltd* where it was accepted that '...access to restricted areas without consultation with the native title party may result in interference' (at [67]).

[50] Based on the evidence provided by the native title party, I conclude both the ceremonial cave and the burial ground are sites of particular significance to the native title party as contemplated by s 237(b). The Government party acknowledges there is sufficient evidence to conclude these are sites of particular significance.

[51] Both the grantee party and Government party contend the State's regulatory regime concerning Aboriginal Heritage, mining and the environment is sufficient to ensure interference with sites is unlikely. Though the Tribunal is entitled to have regard and give considerable weight to the regulatory regime, it must consider the evidence presented in each case to decide whether the regime will be sufficient to make interference unlikely. For example, the Tribunal has previously accepted that burial sites may be sites of particular significance, notwithstanding a lack of evidence describing the specific connection between the site and the laws and customs of the native title holders (see *Councillor and Papertalk v Bayform Holdings Pty Ltd* at [43]). In the present matter, such evidence does exist.

[52] Whilst there is no evidence to suggest the grantee party will not comply with the AHA, I am not satisfied the AHA can provide sufficient protection given the nature of the two sites of particular significance. The evidence indicates:

- unauthorised or unaccompanied access to the burial site or the ceremonial cave may amount to interference within the meaning of s 237(b);
- it is unlikely the burial ground is easily recognisable to persons other than the native title party: it is simply marked by 'two bloodwood *koondaboonu* trees'

(Affidavit of Mr M Hobbs at 13) which grow throughout the proposed licence (Affidavit of Ms Nugget at 19); and

- the ceremonial cave is within an area where other caves are located and may not be easily recognisable to persons other than the native title party: 'Gooniyandi know which cave in Budgerdi is the significant cave' (Affidavit of Mr M Hobbs at 7).

[53] The grantee party have not indicated the steps they may take to avoid interference with such sites, and there is little information about the activities they intend to conduct over the area in the five or more years they have grant of the proposed licence. The Government party has not offered any condition requiring the grantee party to enter into a Regional Standard Heritage Agreement (RSHA) with the native title party if requested ('RSHA condition'). The RSHA condition has often been offered by the Government party in other expedited procedure matters in the Kimberley region which have proceeded to an inquiry before the Tribunal (see for example *Warrwa #2 v 142 East Pty Ltd* (at [23])).

[54] Whilst the grantee party has indicated it is willing to enter into a RSHA with the native title party, there is no statutory declaration, affidavit or other evidence that a signed RSHA has been forwarded to the native title party, and no RSHA condition binding the grantee party. The native title party reply states no RSHA has been offered to the native title party (at 3). However, even if I were satisfied there was an RSHA available to the native title party, via the RSHA condition or otherwise, given the nature of the sites of particular significance within the proposed licence, I find there is a real risk of interference with the sites of particular significance unless the full right to negotiate procedure contemplated under s 31 of the Act is followed.

[55] Given the evidence before me, I find the grant of the proposed licence is likely to interfere with sites of particular significance to the native title party in accordance with its traditions.

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

[56] The Tribunal is required under s 237(c) to make an evaluative judgement of whether major disturbance to land and waters is likely to occur (in the sense that there is a real risk of it) from the point of view of the entire Australian community, including the

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

[57] As noted above, the proposed licence falls within the West Kimberley National Heritage Listing (West Kimberly 106063). The Tribunal has, on a number of occasions found that a National Heritage Listing is not determinative of whether major disturbance is likely (see *Watson v Brockman Exploration Pty Ltd* at [75]).

[58] The native title party has not submitted any contentions or evidence regarding s 237(c) and similarly no specific contentions have been received from the grantee or Government party.

[59] Based on the evidence and contentions submitted by the parties, I conclude there are no topographical, geological or environmental factors which would lead members of the Australian community to believe that exploration activities would result in any major disturbance to land or waters on the proposed licence.

[60] I find the grant of the proposed licence is not likely to involve, or create rights whose exercise is likely to involve, major disturbance to land or waters.

## Determination

[61] The determination of the Tribunal is that the act, namely the grant of exploration licence E04/2303 to Western Barite Pty Ltd, is not an act attracting the expedited procedure.

**Helen Shurven**
**Member**
**9 October 2014**