

NATIONAL NATIVE TITLE TRIBUNAL

John Walter Graham and Others on behalf of Ngadju v Platina Resources Ltd and Another
[2014] NNTTA 101 (21 October 2014)

Application No: WO2013/0891 WO2013/1353 & WO2013/1354

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

- and -

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

John Walter Graham and Others on behalf of Ngadju (WC1999/002) (native title party)

- and -

Platina Resources Ltd (grantee party)

- and -

The State of Western Australia (Government party)

DETERMINATION THAT THE ACTS ARE ACTS ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 21 October 2014

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

Legislation: [Native Title Act 1993 \(Cth\)](#), ss [29](#), [30](#)(1), [31](#), [32](#)(3), [32](#)(4), [151](#)(2), [237](#)
[Mining Act 1978 \(WA\)](#)
[Aboriginal Heritage Act 1972 \(WA\)](#), s [5](#)
[Wildlife Conservation Act 1950 \(WA\)](#), ss [6](#)(1), [23F](#)(4)
[Acts Interpretation Act 1901 \(Cth\)](#), s [36](#)(2)

Cases: *Little v Oriole Resources Pty Ltd* (2005) 146 FLR 576; [\[2005\] FCA 506](#) (*‘Little v Oriole Resources’*)

Silver v Northern Territory (2002) 169 FLR 1; [\[2002\] NNTA 18](#) (*‘Silver v Northern Territory’*)

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

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

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

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

Representative of the native title party: Mr Andrew Burke, Goldfields Land and Sea Council

Representative of the Government party: Mr Matthew Pudovskis, State Solicitor’s Office
Ms Bethany Conway, Department of Mines and Petroleum

Representative of the Grantee party: Mr Hong-Jim Saw, Hetherington Exploration Mining Title & Mining Title Services Pty Ltd

REASONS FOR DETERMINATION

- [1] On 24 April 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 E69/3111 to Platina Resources Ltd ('the grantee party'). On 28 August 2013, the Government also gave notice under s 29 that it intended to grant exploration licences E69/3139 and E69/3146 to the grantee party (I refer to the three exploration licences collectively as 'the proposed licences'). Each notice included a statement that the Government party considers the grant attracts the expedited procedure (that is, that the grant is an act that can be done without the negotiations required by s 31 of the Act). The notices specified the 'notification day' as 24 April 2013 in relation to E69/3111 and as 28 August 2013 in relation to E69/3139 and E69/3146.
- [2] The proposed licences are located within the boundaries of the Ngadju native title claim (WC1999/002 – registered from 3 March 1999). The location, claim overlap and size of each proposed licence are outlined in the table below:

<i>Proposed Licence</i>	<i>Ngadju Claim Overlap</i>	<i>Approximate size (km square)</i>	<i>Location</i>	<i>Shire</i>
E69/3111	100%	305.2	58 kilometres SE'ly of Balladonia	Shire of Dundas, Shire of Esperance
E69/3139	100%	229.6	7 kilometres N'ly of Balladonia	Shire of Dundas
E69/3146	100%	204.4	74 kilometres SW'ly of Balladonia	Shire of Esperance

- [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 s 30(1)(a) and (b), the objection may be made by any registered native title claimant in respect of the relevant land or waters who is registered at four months from the notification day, provided the claim was filed before the end of three months from the notification day. The three month closing date was 24 July 2013 for E69/3111 and 28 November 2013 for E69/3139 and E69/3146, and the four month closing date for E69/3111 was 24

August 2013. The four month closing date for E69/3139 and E69/3146 was advertised as 28 December 2013, but as this was a day on which the Tribunal's offices were closed, by operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the four month closing date became 2 January 2014, the next working day.

- [4] On 22 August 2014, John Walter Graham and others on behalf of Ngadju ('the native title party') lodged an expedited procedure objection application with the Tribunal in relation to E69/3111. The native title party also lodged expedited procedure objection applications in relation to E69/3139 and E69/3146 on 19 December 2013. The applications were accepted by the Tribunal pursuant to s 77 of the Act.
- [5] At a preliminary conference held in relation to E69/3111 on 24 September 2013, parties advised they were negotiating a heritage protection agreement that would lead to the disposal of the objection. The matter was therefore adjourned to allow negotiations to continue. A preliminary conference was held in relation to E69/3139 and E69/3146 on 28 January 2014, at which parties advised they were still in the process of negotiating an agreement. The three matters were heard again at a status conference on 16 April 2014 and, as parties advised they were no closer to a resolution, I set directions for the inquiry.
- [6] Pursuant to the directions, the Government party documentary evidence was provided on 14 May 2014 through the Department of Mines and Petroleum ('DMP'). The native title party submissions were filed on 9 July 2014, and included the following:
- Statements of Contentions in relation to each of the proposed licences, all dated 9 July 2014.
 - Affidavit of Mr John Walter Graham, affirmed 19 September 2013.
 - Witness statement of Mr Adrian John Schultz, dated 5 May 2009.
 - Witness statement of Ms Phyllis Wicker, dated 6 May 2009.
 - Witness statement of Mr Stephan Reginald Rule, dated 7 May 2009.
 - Witness statement of Ms Valma Joy Schultz, dated 7 May 2009.

- Witness statement of Mr Aaron James Rule, dated 11 May 2009.
- Witness statement of Mr James Schultz, dated 22 March 2012.
- Witness statement of Mr Justin Scott Graham, dated 22 March 2012.
- Witness statement of Mr Rule Johnson Wicker, dated 3 April 2012.
- Witness statement of Mr John Walter Graham, dated 11 May 2012.
- Witness statement of Mr Leslie Schultz, undated.
- Transcript of proceedings in Federal Court matter WAD6020 of 1999 and WAD6221 of 1998 (Ollan Dimer and Others on behalf of the Ngadju and the Ngadjunngarra – 7-8 December 2004, 15-18 June 2009 and 7 May 2012).

[7] I accept that each of these people has authority to speak for the area of the native title party claim, and so by extension, can speak for the proposed licences subject to the objection applications, as they all fall within the claim area.

[8] The grantee party provided statements of contentions in relation to each of the proposed licences on 23 July 2014. The Government party provided a statement of contentions in reply to the native title party, through the State Solicitor's Office ('SSO') on 7 August 2014.

[9] Although the native title party's objection application contains statements relating to all three limbs of s 237, the native title party contentions pursue s 237(a) and (b) only. Section 32(4) of the Act requires the Tribunal, as the arbitral body, to determine whether the act is an act attracting the expedited procedure, in light of s 237 of the Act. The criteria in s 237 define what an act attracting the expedited procedure is. Whether or not the native title party offers contentions on all limbs of s 237, I must have regard to each of those limbs in the context of the material before the Tribunal.

[10] On 22 August 2014, the Department of Mines and Petroleum, native title party and the grantee party each confirmed via email that they did not intend to make further submissions, and agreed the matters could proceed to be heard 'on the papers' in

accordance with s 151(2) of the Act. I have reviewed the material before the Tribunal and I am satisfied the matters can be adequately determined ‘on the papers’.

[11] Maps prepared by the Tribunal’s Geospatial services were circulated to parties on 9 September 2014, and no party objected to the Tribunal using them in the course of this inquiry.

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 acts

[14] The Government party provided the following documents in relation to each of the proposed licences:

- A Tengraph plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity.
- Reports and plans 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.
- A Tengraph quick appraisal detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features.

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

E69/3111

- Vacant Crown land overlapping at 100 percent.
- A proposed national park (PNP/38) overlapping at 57.2 percent.

E69/3139

- Pastoral Leases 3114/1147 (Balladonia), 3114/1229 (Noondoonia) and 3114/1002 (Woorlba) overlapping at 82.2 percent, 0.9 percent and 15.2 percent respectively.
- Three parcels of vacant Crown land overlapping at 0.2 percent, 0.3 percent and less than 0.1percent respectively.
- One parcel of private land overlapping at less than 0.1 percent.
- One road reserve (Eyre Highway) overlapping at less than 0.1 percent.

E69/3146

- Four parcels of vacant Crown land overlapping at 8.4 percent, 45 percent, 45.6 percent and 0.2 per cent respectively.
- One general lease overlapping at less than 0.1 percent.
- Three parcels of road reserve (Parmango Road and Balladonia Road), each overlapping at less than 0.1 percent.

[16] The quick appraisal establishes that the proposed licences have previously been subject to the following mineral tenure:

E69/3111

- One temporary reserve granted in 1980 and expired in 1982, overlapping at 100 percent.

E69/3139

- Five exploration licences overlapping the proposed licence at between 13.8 percent and 16.2 percent, granted between 2006 and 2008 and surrendered in 2009.
- Two temporary reserves granted in 1980 and 1981 and cancelled in 1982 and 1984, overlapping at 69.5 per cent and 30.5 per cent respectively.

E69/3146

- Five exploration licences overlapping between 3.9 percent and 55 percent, with an average lifespan of one year.
- Five temporary reserves granted in 1980 and 1981 and cancelled between 1982 and 1983, overlapping at between 1.6 per cent and 66.8 per cent.

[17] The quick appraisal establishes the following services on the proposed licences:

E69/3111

- Six non-perennial (non-permanent) lakes.

E69/3139

- Nine geodetic survey stations (SSM-MC 4, SSM-Balladonia 29, SSM-Balladonia 30, SSM-Balladonia 33, SSM-NMF 125, SSM-BALA64, SSM-MC04T, SSM-BALA71 and SSM-145).
- Four major roads (including Eyre Highway).
- 24 tracks.
- One airfield runway.

- Four fence lines.
- One yard.
- Nine dams.
- One tower/mast.

E69/3146

- Five geodetic survey stations (SSM-UM 103, SSM-RM 118, SSM-UM 104T 1, SSM-UM 104 and SSM-UM 105).
- Seven tracks (including Balladonia Road).
- One ruin.
- Garbabarlobulla Rock
- Chugarlunginya Rock
- Bringabinya Rock
- Two rock outcrops.
- One earth dam.
- Three non-perennial (non-permanent) lakes.

[18] The reports from the DAA Database establish there are no sites within the proposed licences that are registered under the *Aboriginal Heritage Act 1978 (WA)* ('AHA'). However, the reports indicate that one 'other heritage place' (Deralinya, Site ID 1641, lodged, open access, artefacts/scatter, historical) is situated within the area affected by E69/3146. The Government party states that the DAA has yet to assess the place to determine whether it satisfies s 5 of the AHA.

[19] According to mapping prepared by the DMP and the Tribunal, there do not appear to be any Aboriginal communities within the proposed licences or surrounding areas.

[20] The Draft Tenement Endorsement and Conditions Extract indicates that the proposed licences will be subject to the standard four conditions imposed on the grant of all exploration and prospecting licences in Western Australia (see *Tulloch v Western Australia* at [11]-[12]). These conditions 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.

[21] In addition, the proposed licences will have the following further conditions:

E69/3111

In respect to the area of land designated PNP 38 in TENGRAPH, hereinafter referred to as the designated area, the following additional conditions shall apply:

5. Prior to accessing the licence area, the licensee shall consult with the Environmental Officer, DoIR [Department of Industry and Resources, now DMP], and ensure that where required all vehicles and equipment entering the designated area are washed down to remove soil and plant propagules and adhering to such conditions specified for the prevention of the spread of soil-borne diseases.
6. Prior to any activity involving disturbance to vegetation and soils including:-
 - exploration access; and/or
 - exploration sampling;
 the licensee preparing a detailed program for each phase of proposed exploration for written approval of the Director, Environment, DoIR. The Director, Environment, DoIR to consult with the Regional/District Manager, Department of Conservation of Land Management or the Department of Environmental Protection or other government agency (as relevant) prior to approval. This program to describe the environmental impacts and programs for their management and is to include:
 - maps and/or aerial photographs showing the proposed locations of all ground activities and disturbances;
 - the purpose, specifications and extent of each activity and disturbance;
 - descriptions of all vegetation types (in general terms), land forms, and unusual features likely to be disturbed by such proposed disturbances;
 - details on proposals that may disturb sensitive terrestrial habitats including any declared rare flora and fauna if applicable;
 - procedures to protect the integrity of special ecosystems such as wetland systems, mangal communities and rainforests areas [*sic*] (and/or associated rainforest monitoring sites) if applicable;
 - techniques, prescriptions, and timetable for rehabilitation of all proposed disturbances;

- undertaking for corrective measures for failed rehabilitation;
 - details of water requirements from within the designated area;
 - details of refuse disposal; and
 - proposals for instruction and supervision of personnel and contractors in respect to environmental conditions.
7. Access to and from and the movement of vehicles within the licence area being restricted to ground or seasonal conditions and routes approved under the program or otherwise agreed by the Environmental Officer.
 8. At agreed intervals, not greater than 12 monthly, the licensee providing a brief report to the Director, Environment, DoIR, outlining the progress of the operation and rehabilitation program and the proposed operations and rehabilitation programs for the next 12 months
 9. Prior to the cessation of the exploration/prospecting activity in the designated area, the licensee notifying the Environmental Officer, DoIR and arranging an inspection as required.

E69/3139

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.
7. No excavation, excepting shafts, approaching closer to the Eyre Highway, Highway verge or the road reserve than a distance equal or twice the depth of the excavation and mining on the Eyre Highway or Highway verge being confined to below a depth of 30 metres from the natural surface.
8. No interference with Geodetic Survey Station 145, MC 4, 4T, Balladonia 69, 30 & 33, BALA 64 & 71 and NMF 125 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.
9. 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.
10. Mining within a radius of 150 metres of any Australian Telecommunications Commission microwave repeater station being confined to below a depth of 60 metres from the natural surface.
11. No interference with the Australian Telecommunications Commission microwave repeated station ray-line.

E69/3146

5. Mining on any road, road verge or road reserve being confined to below a depth of 15 metres from the natural surface.

6. No interference with Geodetic Survey Station UM 103, 104, 104T & 105, and SSM-RM-118 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

[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 intended to be imposed for each proposed licence:

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 [*sic*] attention is drawn to the provisions of the:
 - Waterways Conservation Act, 1976
 - Rights in Water and Irrigation Act, 1914
 - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
 - Country Areas Water Supply Act, 1947
 - Water Agencies (Powers) Act 1984
 - Water Resources Legislation Amendment Act 2007
4. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.
5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the DoWs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.

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

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

In respect to Waterways the following endorsement applies:

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

[23] The following further endorsements are listed in respect of E69/3139 and E69/3146:

E69/3139

- The grant of this Licence does not include any private land referred to in Section 29(2) of the Mining Act 1978 except that below 30 metres from the natural surface of the land.

E69/3146

- The land the subject of this Licence affects a Rare Flora site (including Rare Flora Site 092441) declared under the Wildlife Conservation act 1950. The Licensee is advice to contact the Department of Environment and Conservation for information on the management of Declared Rare Flora (or Priority Listed Flora) present within the tenement area.
- The Licensee's attention is drawn to the existence of a licence for Mentoring and Development of Children at risk, Esperance granted pursuant to section 91 of the Land Administration Act 1997 and which is shown designated as FNA 10695 in TENGRAPH.

[22] The Government party statement of contentions indicates it intends to impose a condition on each proposed licence requiring the grantee party to enter into a Regional Standard Heritage Agreement ('RSHA') with the native title party if requested by the native title party ('RSHA Condition'), in the following terms:

In respect of the area covered by the licence the Licensee, if so requested in writing by Ngadju, the applicants in Federal Court application number WAD 6020/1998 (WC1999/002), 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 Ngadju the Regional Standard Heritage Agreement endorsed by peak industry groups and Goldfields Land and Sea Council.

Native title party submissions

[24] As mentioned at [6] above, the native title party submissions comprise a range of materials including the NTP Contentions, transcripts from Federal Court proceedings concerning the native title party's claim, an affidavit and various witness statements.

Native Title Party Contentions

[25] The native title party states that it maintains its objection in relation to s 237(a) and (b) of the Act only. That is, the native title party argues that the grantee party's activities on the proposed licences are likely to interfere with the carrying on of the native title party's community or social activities, and likely to interfere with areas or sites of particular significance in accordance with the native title party's traditions.

[26] The NTP Contentions state the following in regard to s 237(a) of the Act:

- a. The Ngadju people are a community of native title holders who carry on community and social activities in accordance with their traditional law and custom in or surrounding the proposed licence areas. In particular:

- i. hunting, camping and caring for country are important activities undertaken by the Ngadju people exercising their traditional law and custom;
 - ii. there are areas in the Ngadju claim designated as Marlpa tracks or Ngadju highways. These areas are of paramount and particular importance to the Ngadju people as they are areas where the Ngadju people travel, hunt, camp and care for country regularly. They also connect rock holes, camp sites and sites that are of significance to the Ngadju people;
 - iii. there is one Marlpa track that runs to Point Culver that is proximate to E69/3111. Point Culver is still used by Ngadju people as a fishing spot and is accessed by following the Marlpa track. Point Culver is also home of the Maparn Man, Snake and Seal stories;
 - iv. there are two Marlpa tracks that cross E69/3139 and three Marlpa tracks that run in close proximity to the area;
 - v. there are three Marlpa tracks that cross E69/3146 which connect areas used by the Ngadju people such as Mt Ragged, Pine Hill, Jurandar and Booanya Rock;
 - vi. by using Marlpa tracks, Ngadju people retain a connection to their country by connecting to their ancestors and teaching future generations about country; and
 - vii. the Balladonia region, the area covered by and surrounding E69/3139, is an area regularly used by the Ngadju people participating in the abovementioned activities.
- b. Dislocating the Ngadju people from the proposed licence areas will adversely impact on their capacity to maintain the abovementioned traditional activities and lifestyles. In particular:

- i. only Ngadju people can do things in Ngadju country without permission; other groups need to ask permission to come on to Ngadju country and do things on Ngadju country;
 - ii. Ngadju people require continuous and unaltered access to Marlpa tracks to undertake the abovementioned activities, fulfil their cultural responsibilities and maintain a connection to their ancestors; and
 - iii. protection of country is central to Ngadju people exercising respect for their past and the spirits of their ancestors. Ngadju people believe that failure to look after country will result in the land, which contains the spirits of their ancestors, being adversely affected which can result in the Ngadju people being made ill or punished by the spirits.
- c. Activities of the grantee party over the proposed licences will directly interfere with the ability of Ngadju people to conduct community and social activities. In particular:
 - i. the Ngadju people regularly participate in these activities in the proposed licence areas, particularly along Marlpa tracks. The regularity of the participation makes direct interference with social and community activities likely; and
 - ii. prevention of Ngadju from accessing country, even for a limited time, will interfere with the ability of Ngadju to look after country. This is particularly so in the case of areas surrounding Marlpa tracks.
- d. The right to negotiate is required to ensure that consultation and negotiation between the native title party and the grantee party occurs to ensure that these social and community activities are not likely to be interfered with. In particular:
 - i. the nature of the activities conducted in the proposed licence areas are such that negotiation, not merely consultation, on issues such as access and the impact of exploration activities need to occur in order to avoid interference.

[27] The NTP Contentions state the following in relation to s 237(b) of the Act:

- a. The proposed licences are located in areas proximate to or overlapping Marlpa tracks or Ngadju highways. In particular:
 - i. there is a Marlpa track that runs to Point Culver and is proximate to E69/3111;
 - ii. there are two Marlpa tracks that cross E69/3139 and three Marlpa tracks that run within eight kilometres of the area; and
 - iii. there are three Marlpa tracks that cross through E69/3146.
- b. The proposed licences are located in areas proximate to several rock holes:
 - i. rock holes are of particular significance to the Ngadju people. The Ngadju people believe that the spirits of their ancestors gather at rock holes and it is important in Ngadju culture to protect them;
 - ii. rock holes are found along the escarpment in the coastal area between Israelite Bay and Point Culver;
 - iii. there are several rock holes within, and proximate to, E69/3139 located along the Marlpa tracks, including Balladonia rock hole and Afghan rock hole; and
 - iv. there are several rock holes proximate to E69/3146, including Murtadinia rock hole, Juranda rock hole, Kangawarie rock hole, Carnadinia rock hole, Cardinia rock hole and Breeboorinia rock hole.
- c. The Balladonia region, the area covered by and surrounding E69/3139, is an area of particular significance to the Ngadju people. In particular:
 - i. the Ngadju people believe that Balladonia is the home of an old white turkey. It is not hunted by the Ngadju people and must be respected. The knowledge of this turkey has been passed down through each generation;

- ii. the Balladonia station and work shed located just outside the boundary of E69/3139 is believed to be an early massacre site and now contains unsettled spirits; and
 - iii. many Ngadju people were born and raised in the Balladonia region and have family members buried there. They feel that this is a special place where they can connect to their ancestors. Ngadju people continue to bring their children to Balladonia to learn about country and the traditional law and customs.
- d. The existence of the areas associated with Balladonia, Marlpa tracks and rock holes within and around the proposed licences, being areas of particular significance, reduces the utility of an endorsement on the grant of the proposed licences which draws the grantee party's attention to the AHA. In particular:
- i. the nature and importance of Marlpa tracks and rock holes is such that any access to certain areas will constitute interference pursuant to s 237(b) of the Act, but may not necessarily be prohibited by s 17 of the AHA.
- e. The fact that the grantee party has executed a copy of the RSHA does not mean that it is unlikely that the proposed licences will interfere with sites or areas of particular significance. In particular:
- i. the nature of the sites and places associated with the spirits of the ancestors of the Ngadju people are such that interference within the proposed licences or the area immediately surround them may impact upon, or interfere with, these sites;
 - ii. the RSHA does not address the fact that mere access to certain sites or places within the proposed licence areas constitutes an interference; and
 - iii. the RSHA, in light of the areas associated with Balladonia, the Marlpa tracks and rock holes within or proximate to the proposed licence

areas, potentially facilitates interference by permitting the grantee party to conduct certain activities (including access) without the native title party's consent.

- f. The right to negotiate is required to ensure that consultation and negotiation between the native title party and the grantee party occurs to ensure that the sites or areas are not likely to be interfered with. In particular:
 - i. the native title party has onerous, regional cultural responsibilities in relation to the proposed licence areas, which are not addressed by the RSHA process. A meaningful negotiation process is required so that the native title party is able to fulfil these responsibilities; and
 - ii. the nature of the sites surrounding the proposed licence areas are such that negotiation, not merely consultation, on issues such as access and the impact of exploration activities need to occur in order to avoid interference.

Native Title Party Evidence

[28] As the affidavit and witness statements were prepared for the purpose of claimant proceedings before the Federal Court, they concern a broader compass of matters than are usually encountered in expedited procedure objection proceedings. For convenience, I have summarised the material I consider to have some relevance to the issues to be determined.

[29] *Affidavit of Mr John Walter Graham*: Mr Graham states that he goes on trips with his children and grandchildren to teach them about Ngadju country (at 9). Mr Graham describes travelling along Marlpa tracks and *ngarda* [white man] roads and stopping at places such as Cardinia, Juranda rock hole, Deralinya and Point Culver (at 17). Mr Graham states that, when travelling through the country, he 'come[s] up the bush way, on the Marlpa tracks, as this is where we can get the best bush tucker, emu, turkey, kangaroos, ducks, yabbies and bobtails (at 19). Mr Graham states that '[i]f I want to hunt and gather I just go along the Marlpa tracks,' and while doing so, he checks on rock holes and camping spots (at 25-26).

- [30] *Witness statement of Mr John Walter Graham:* Mr Graham states there are rock holes ‘all over Marlpa country’ and ‘we still use them when we are travelling around our country. They are the Marlpa highways’ (at 113). Mr Graham describes a Marlpa track that travels north from Israelite Bay to Pine Hill, then on to Juranda rock hole, Pioneer Rock and Coragina Rock before travelling north east to Balladonia (at 118). Mr Graham also describes tracks running east from Mt Ragged through Kangawarie rock hole to Bulbinya to the east of E69/3146 (at 122), south from Bulbinya to Point Culver (at 123), and northwest from Deralinya to Lake Glass and Mt Andrew (at 125). According to Mr Graham, there are rock holes all through the escarpment between Israelite Bay and Point Culver (at 123). Mr Graham also states that he goes fishing at Israelite Bay and Twilight Cove and visits Point Culver ‘two or three times a year’ (at 182, 268). Mr Graham states that he uses fire to burn dead trees and spinifex to promote regrowth and attract animals for hunting (at 142).
- [31] *Witness statement of Mr Adrian Schultz:* Mr Schultz states he has been hunting on Balladonia and says there ‘is a variety of bush tucker out there and the vegetation is lower so you can see the animals better’ (at 47). Mr Schultz says that Balladonia, Noonoonia and Nanambinia are ‘the best hunting spots for *gibara* (turkey), kangaroos, and *tjula* [emu]’ (at 89) and refers to a story about an old white turkey that lives on the flat at Balladonia (at 124). Mr Schultz says that ‘in the old days, the old people would travel through the country on the “Ngadju Highways”’ and describes a particular highway that connects a series of rock holes from Norseman to Balladonia and is followed by the Eyre Highway (at 60). He also describes highways travelling east from Balladonia to Bromus Dam and north from Balladonia to Coonana (at 91). According to Mr Schultz, Ngadju people ‘still care for these rock holes and know to use them if we are ever in trouble out in the bush’ (at 61). Mr Schultz states that ‘[i]t is important to protect places like our rock holes’ and ‘Ngadju people get very disturbed if sites have been desecrated because it can disturb the spirits of the old people’ (at 75).
- [32] *Witness statement of Ms Phyllis Wicker:* Ms Wicker states that Balladonia is a good place to go hunting (at 74) and says there is a line of rock holes going east from Norseman to Balladonia (at 93). Ms Wicker states that ‘[a]s Ngadju people, we have got to look after our *mitjal* [water] places. Looking after them means cleaning out the

rock holes' (at 95). Ms Wicker says that the Ngadju people also have a duty to protect dreaming sites (at 110). Ms Wicker states that Balladonia is special to her as it is the place where her father was born (at 133).

- [33] *Witness statement of Mr Stephan Reginald Rule:* Mr Rule states that rock holes are very important to Ngadju people, as they are a link to their ancestors and are places where their spirits reside (at 59, 78). Mr Rule states that '[w]e owe it to our old people and the spirits to keep them clean and make sure animals and people can still use them' (at 59) and '[i]t is very important for us to go back there and visit the rock holes when we travel around Ngadju country' (at 78). Mr Rule states that Ngadju people have a responsibility to look after Ngadju country, for example by cleaning out water holes and 'keeping an eye on what is happening in the bush' (at 76). Mr Rule describes a series of rock holes from Norseman to Balladonia (at 79) and south from Balladonia to Nanambinia (at 80). Mr Rule states that he travels to Balladonia 'once in a blue moon now days' as it is 'a long way to go and it uses a lot of petrol getting there' (at 113). Mr Rule says there are creatures know as *wudatjis* that live 'out Balladonia way' and other places in the claim area (at 124).
- [34] *Witness statement of Ms Valma Joy Schultz:* Ms Schultz states that 'rock holes are important to us. Many of our old people used them and their spirits are around these rock holes (as well as in the hills and at the lakes). The old people used these rock holes as places to camp on the Ngadju highways' (at 69). Ms Schultz states that she and her husband take their children out in the bush to teach them about Ngadju country and culture (at 93-94). Ms Schultz also refers to a snake story associated with Balladonia (at 154).
- [35] *Witness statement of Mr Aaron James Rule:* Mr Rule states that Balladonia is 'an important area for the Rule Family' and 'a good place to get *gibara* [turkey] and goanna' (at 89). Mr Rule states that he has been on the track from Israelite Bay to Balladonia 'heaps of times' (at 93). Mr Rule also refers to snake and seal stories associated with Point Culver (at 153, 156).
- [36] *Witness statement of Mr James Schultz:* Mr Schultz states that he takes his children, nieces and nephews hunting and camping every holiday. Mr Schultz says that they 'go to many places in Ngadju country' including Balladonia (at 35). Mr Schultz also

refers to a series of rock holes between Norseman and Balladonia ‘roughly 20 miles distance’ from one another, along which the highway has been built (at 77).

- [37] *Witness statement of Mr Justin Scott Graham:* Mr Graham states that ‘it is very important to protect rock holes’ (at 57). Mr Graham states that the rock holes ‘are all in a line with each other and you move about the country easily by following the rock holes’ (at 57). Mr Graham says he ‘know[s] a few rock holes around Balladonia. Mainly to the North between Coonana and Balladonia’ (at 59).
- [38] *Witness statement of Mr Rule Johnson Wicker:* Mr Wicker states that rock holes are an important source of water for Ngadju people (at 75). In relation to Balladonia, Mr Wicker states that it ‘was a place where lots of Ngadju people were passing through they would pick up supplies from there and used to go there to do ceremonies’ (at 92). Mr Wicker states that he has family buried at Balladonia (at 93). Mr Wicker also refers to a series of rocks holes and camping grounds that follow a track between Balladonia and Norseman (at 100).
- [39] *Witness statement of Mr Leslie Schultz:* Mr Schultz talks about burning off practices ‘on country’ (at 50). Mr Schultz says that he now coordinates a Ngadju conservation committee which is working with CSIRO, the Department of Environment and Conservation and the Wilderness Society to research traditional fire management but says that further work needs to be done with the Government ‘to allow traditional burning to be done more freely’ (at 52). Mr Schultz also refers to Ngadju highways between Norseman and Balladonia and between Balladonia and Israelite Bay, although he does not know the rock holes that make up the latter track (at 118, 120).
- [40] *Transcripts:* The native title party also provides transcripts of proceedings in the native title party’s claimant application. Much of this material has little relevance to the present inquiry, or simply reiterates matters disclosed in the affidavit and witness statements. Nevertheless, I have taken this material into account where relevant.
- [41] *Maps:* The native title party has also provided maps produced by the Goldfields Land and Sea Council in relation to each of the areas concerned, indicating the boundaries of the proposed licences, the locations of sites and the paths of specific Marlpa tracks. These maps are not attached to any affidavit or witness statement and no explanation is provided as to how the maps were produced, save for a note on each map stating

that the locations of Ngadju places, dreaming stories and Marlpa tracks were ‘[t]aken from Ngadju witness statements and [the] Ngadju connection report.’ I note that the connection report was not filed in these proceedings. In any event, the task of compiling this information and representing it on a map would have no doubt required a certain amount of analysis and interpretation. In this context, a witness statement or affidavit as to how the maps were created, and the significance of the areas marked on the maps which are within or near the proposed licences, would have greatly assisted the Tribunal in making this determination. Although the Tribunal is not bound by the rules of evidence, absent any explanation of the circumstances in which the maps were produced or any statements from relevant witnesses deposing to the accuracy of the data or the significance of the areas depicted, I have given little weight to the maps and have not relied on them in any substantial way in making this determination.

Grantee party submissions

- [42] The grantee party filed statements of contentions in respect of each of the proposed licences, though they are in substantially similar terms.
- [43] The grantee party states that the initial periods of grant will involve low impact activities including field reconnaissance, geological mapping, surface geophysics, sample collection, soil sampling, aerial surveys and ground-based geosurveys. The grantee party intends to follow these activities with the identification of drill targets and reconnaissance drilling in the second phase of exploration. In relation to E69/3139 and E69/3146, the grantee party notes there is sufficient infrastructure to allow easy access to all parts of the proposed licences on major road networks, which will limit potential interference. The grantee party also notes that conditions to be imposed in relation to the proposed national park on E69/3111 will ‘restrict any proposed ground disturbance without sufficient management plans being provided for even low impact activities.’
- [44] The grantee party says it will comply with all conditions and legislative requirements, including but not limited to the AHA, the *Mining Act 1978* (WA) and subsidiary legislation, and reiterates its offer to complete heritage surveys in accordance with the RSHA before commencing any ground disturbing activities. The grantee party

acknowledges there may be sites of particular significance within the proposed licences that are not recorded on the Register of Aboriginal Sites and that sites affected ‘may extend away from a particular site in ways recognizable only by the native title party.’ In light of this, the grantee party undertakes to:

- notify the native title party about proposed on-ground works (whether ground disturbing or not) and provide detailed information before commencing such works;
- advise the native title party of dates when the grantee party will be on-ground;
- take additional care when conducting on-ground activities with respect of the native title party’s requests;
- limit the use of motor vehicles where possible;
- where possible, complete rehabilitation of any disturbances as exploration occurs;
- avoid any sites or areas of significance if the native title party provides notice and co-ordinates; and
- register heritage surveys completed in compliance with the AHA.

[45] The grantee party states that the proposed activities are unlikely to involve fieldwork of periods greater than two weeks at any time, and are likely to be limited to a maximum of two expeditions in any 12 month period. The grantee party states that the areas will be accessed using known roads and tracks.

Government party submissions

[46] The Government party make a number of submissions regarding aspects of the native title party’s evidence.

[47] *Affidavit of Mr John Walter Graham*: the Government party accepts that Mr Graham’s affidavit is an accurate statement of his connection to Ngadju country and that it deposes to the kinds of activities in which Mr Graham and other Aboriginal people

participate in Ngadju country. However, the Government party contends that the affidavit is of less assistance to the Tribunal on the likely extent of interference with community or social activities or significant areas or sites. In particular, the Government party notes that the affidavit was produced for the purpose of the trial proceedings of the claim and says it does not address these particular future acts. The Government party contends that it is not possible to draw inferences from the affidavit specific to the proposed licences and it is therefore of little use to the Tribunal in this inquiry.

[48] *Witness statements:* the Government party notes that the witness statements were also drafted for the purpose of the claimant proceedings in the Federal Court. The Government party submits that the witness statements are of a general nature and it is not possible to discern from them where, if anywhere, the Ngadju people engage in community or social activities on the proposed licences. The Government party contends that the evidence fails to establish that Ngadju people engage in community and social activities within any of the proposed licence areas, and does not clearly establish the location of any Marlpa tracks or rock holes in relation to any of the proposed licences. The Government party contends that the witness statements also fail to consider the impact of the proposed licences on Ngadju community or social activities and significant areas or sites, to the extent any exist within the relevant areas.

[49] *Transcript of native title determination:* the Government party contends that the transcript material is of limited assistance in this inquiry as it does not refer to the proposed licences and does not address the impact of the proposed licences on the activities of the Ngadju people or any significant areas or sites.

[50] The Government party makes the following submissions in relation to s 237(a):

- It is accepted that community and social activities such as hunting, camping, teaching children about country and looking after country are carried on by the native title party in Ngadju country generally.
- There is no evidence that members of the native title party engage in community or social activities within the area of any of the proposed licences. The evidence

provided by the native title party fails to consider the specific locations of the proposed licences or the potential impact of those licences.

- To the extent that the native title party relies on interference with community or social activities carried on outside the area of the proposed licences, it has failed to identify a nexus between any community and social activities of the Ngadju and the activities to be undertaken on the proposed licences.
- It is not accepted that the existence of a Marlpa track is an ‘activity’ to which s 237(a) applies. Although Marlpa tracks may be used to access various locations, specifically rock holes located along the tracks, the native title party has not identified any particular rock holes that are, or may be, located within any of the proposed licence areas. There is insufficient evidence to conclude that any member of the native title party currently accesses or uses any particular rock holes with any degree of regularity.
- If the Tribunal is prepared to infer that members of the native title party carry out community or social activities in the area of any of the proposed licences, there is not likely to be direct interference with those activities for the following reasons:
 - The grantee has stated that any ground disturbing activities are intended to be conducted in a way which will not adversely impact on heritage sites and will respect local cultural concerns.
 - The grantee party has indicated its willingness to enter into an RSHA-type agreement with the native title party, which is a relevant factor in determining whether or not there is likely to be interference with the social and community activities of the native title holders, and indicates a willingness to consult with the native title party and avoid activities likely to interfere with the asserted social and community activities.
 - The low-impact, small-scale and infrequent exploration activities planned by the grantee party are not likely to have any real disruptive effect on the asserted social and community activities, particularly given the intentions of the grantee party to conduct those activities with cultural sensitivity and to maintain good relations with the native title party. Although from time to time

the grantee party and the native title party may come across one another in the course of their activities, it is not apparent that the activities of the native title party will thereby be prevented or disrupted to any significant extent.

- It is difficult to envisage how mineral exploration could cause substantive interference to the native title party's ability to access the proposed licence areas. The suggestion that the grants will restrict the access of members of the native title party to the proposed licence areas or the Marlpa tracks and rock holes should not be accepted, especially where one or more of the asserted Marlpa tracks are coincident with the Eyre Highway.
- Given the limited nature of the rights held by exploration licensees there is little prospect of access being prevented in any substantial way. An exploration licence does not carry a right to control access to land. At most, the slight risk that the grantee party, exercising its full rights under the proposed licences, might physically be in the way of a member of the native title party in relation to the small area of land where they are operating on any given day, is not substantial enough to constitute interference in the s 237(a) sense.
- The proposed licences have variously been subject to previous and existing exploration, pastoral and other non-native title interests, which are likely to have affected, and continue to affect, the extent to which community and social activities can be carried out in the relevant areas. Any intersection between the grant of the proposed licences and the current activities of the native title party would be the same as, or no more significant than, the previous and continuous use of the area.
- There are no Aboriginal communities within the area of any of the proposed licences.
- Hunting and exploration are, by their nature, inherently capable of coexistence.

[51] The Government party makes the following submissions in relation to s 237(b):

- The fact that the Deralinya site has been lodged under the AHA is not determinative of whether or not it is of particular significance within the meaning of s 237(b). The DAA has yet to assess the place to determine if it meets the requirements of s 5 of the AHA, and the native title party has provided no evidence about this place.
- It is accepted that various Marlpa tracks exist throughout Ngadju country which traditionally comprised routes of access between rock holes. However, it is contended that a Marlpa track is not itself an ‘area’ or ‘site’ within the meaning of s 237(b).
- If the Tribunal is inclined to infer that one or more areas or sites of particular significance to the native title party exist within one or more of the proposed licences, interference with those areas or sites is not likely for the following reasons:
 - If a Marlpa track or rock hole is an ‘area or site of particular significance’, the grantee party is aware of the existence of that area or site and its legal obligations in respect of that area or site. It has agreed to work with the native title party, at least through the RSHA, to avoid interfering with such sites. Whether or not the native title party signs the RSHA, this expression of intention indicates the grantee party’s willingness to consult with the native title party, and the native title party has the opportunity of enforcing this expression of intention by invoking the proposed RSHA Condition.
 - Many Marlpa tracks are now aligned with *ngarda* (white man) tracks; for example, the Eyre Highway follows the track from Norseman to Balladonia. The Ngadju people are still able to access rock holes despite the obvious interference of constructed highways or roads along traditional Marlpa tracks.
 - The grantee party has stated that any ground disturbing activities are intended to be conducted in a way which will not adversely impact on heritage sites and which will respect local Aboriginal cultural concerns.
 - The proposed licences have been variously subject to previous and existing exploration, pastoral and other non-native title interests and 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, given the grantee party's undertaking regarding heritage protection and the conditions associated with the proposed national park on E69/3111.

- The native title party's evidence suggests that Ngadju people are able to traverse Marlpa tracks in the region to access rock holes, notwithstanding current and former pastoral and mineral exploration activity.
- The AHA and its associated processes are likely to prevent interference with any area or site of particular significance to the native title holders.

[52] The Government party makes the following submissions in relation to s 237(c):

- Section 237(c) is only enlivened where there is a significant, direct physical disturbance of land or waters.
- The grant of the proposed licences is not likely to involve major disturbance or create rights, the exercise of which is likely to involve major disturbance for the following reasons:
 - The exercise of rights conferred by the exploration licence will be regulated by the State's regimes with respect to mining, Aboriginal heritage and the environment.
 - Any authorised disturbance to land caused by the grantee party may be mitigated pursuant to conditions requiring rehabilitation of the land following completion of exploration.
 - The proposed licences have been subject to previous and existing exploration, pastoral and other non-native title interests and the activities contemplated by the grantee party would be the same as, or no more significant than, the previous and continuing use the area.
 - It does not appear that any of the proposed licences have any particular characteristics that would be likely to result in major disturbance to land and waters arising given the nature of an exploration licence.

Considering the Evidence

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

- [53] The Tribunal is required to make a predictive assessment as to whether the grant of the proposed licences and activities undertaken pursuant to it are likely to interfere with the community or social activities of the native title party (in the sense of there being a real risk of interference) (see *Smith v Western Australia* at [23]). 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]).
- [54] I accept that members of the native title party engage in community and social activities such as hunting, gathering, camping, teaching young people about country and looking after country in the claim area generally. However, the evidence gives little indication of the extent to which these activities are carried on in the areas affected by the proposed licences. Although Balladonia appears to be one of several areas within Ngadju country that are considered to be good for hunting, it is unclear whether the activities are centred around Balladonia Rock, which is located several kilometres from the boundary of E69/3139, or whether they are carried on over the broader area of the pastoral lease. In any event, there is little evidence that hunting takes place in the Balladonia area on a regular basis, and there is some evidence that suggests it happens infrequently. For example, Mr John Graham gave evidence at the hearing on 15 June 2009 that he only visits Balladonia a couple of times a year, mainly around holidays. Similarly, Mr Rule explained during a hearing on the following day that his reference to going out to hunt at Balladonia ‘once in a blue moon’ was intended to mean that he only visits the area on holidays. I also note there is evidence that Point Culver is used for fishing; however, the site is some 25 kilometres from E69/3111 and I am not satisfied that interference with these activities is likely to occur as a result of the proposed licence.
- [55] I accept that members of the native title party carry on certain activities associated with the maintenance and protection of rock holes, and I accept these activities form part of obligations to care for country. However, for any rock holes which are said to

exist within the areas affected by the proposed licences, I am not satisfied that the grant of the proposed licences will interfere directly with the performance of these obligations due to the intermittent access the grantee party will undertake, mainly along existing tracks and roadways.

[56] The native title party submits there are Marlpa tracks within, or in close proximity to, the proposed licences, which connect various rock holes and other sites within Ngadju country. There is evidence that Marlpa tracks exist between Norseman and Balladonia near E69/3136; between Balladonia, Pioneer Rock (near E69/3146) and Israelite Bay; between Bulbinya and Point Culver near E39/3111; and through Deralinya in E69/3146, as well as tracks running from Balladonia to Bromus Dam, Coonana and Nanambinia. As Deralinya is located within E69/3146 and Pioneer Rock is situated several kilometres to the north, it is reasonable to infer that one or more of the Marlpa tracks pass through the area. It is also reasonable to infer that one or more tracks intersect with E69/3136, considering its location relative to Balladonia. However, it is not clear how regularly these tracks are used, except where they might coincide with established roads. Nor is it apparent the extent to which members of the native title party rely on access to traditional Marlpa tracks to engage in other community or social activities. In this respect, the native title party's contention (at NTP Contentions at 3.8(c)) that the Ngadju people require 'continuous and unaltered access to Marlpa tracks' to engage in community and social activities is unlikely to be interfered with to any greater extent than existing use and tenure have already interfered.

[57] In any event, it is unlikely the grant of the proposed licences and the grantee party exploration activity would substantially interfere with the use of Marlpa tracks. The proposed conditions require mining on roads, verges or road reserves to be confined to below a depth of 15 metres from the natural surface, so the proposed licences are unlikely to affect the use of tracks that coincide with established roads. It is conceivable that certain activities, such as drilling or blasting, could prevent a member of the native title party from using a specific part of a track in areas where the track does not coincide with an established road. However, this restriction is likely to be brief and intermittent given the grantee party's stated program. In addition, the proposed conditions require the grantee party to backfill and rehabilitate any disturbances to the surface of the land no later than six months after excavation unless

otherwise approved by the relevant Government department. The grantee party has also undertaken, where possible, to rehabilitate any disturbances as exploration occurs. In this regard, any obstruction would be temporary. The risk that activities of this kind might interfere with the use of specific tracks is remote, especially considering the proposed timeframes for exploration and the grantee party's undertaking to provide the native title party with information about the timing of works. In any event, it is likely the grantee party's activities will be limited to discrete parts of the proposed licences at any given time, and I do not accept the native title party's contention that the grants will dislocate the Ngadju people from the relevant areas.

[58] Mr John Graham and Mr Leslie Schultz also refer to using fire to manage the country. In *Western Desert Lands v Teck Australia*, the Tribunal considered evidence about traditional burning practices and concluded that, as there was a real risk the grantee party might be on the tenement when burning was taking place, the grant of the tenement could potentially interfere with those practices. However, in *Western Desert Lands v Teck Australia*, there was evidence that burning occurred over large areas of country, whereas Mr Graham says that burning occurs 'in small circles' (at 142) and Mr Schultz states that he only carries out burning 'in little patches' (at 50). Mr Schultz also gives evidence which suggests that traditional burning practices are restricted by Government regulation. I also note that the grantee party has undertaken to notify the native title party of the dates when it will be on the ground. In the circumstances, I am satisfied there is no real risk of interference with traditional burning as a result of the grants.

[59] On the evidence before me, I find the grant of the proposed licences is not likely to directly interfere with the native title party's community and social activities for the purposes of s 237(a) of the Act.

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

[60] 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 noted above at [18], the DAA Database shows there are no registered sites within the proposed licence areas, although there is one 'other heritage place' within E69/3146 (Deralinya). However, 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 the relevant areas.

- [61] The native title party have made no submissions in relation to Deralinya and, apart from the fact an application has been made to place it on the Register of Aboriginal Sites, there is no evidence regarding its present significance other than the statement of Mr John Graham that 'people used to camp all around' the site (at 247). As such, there is no basis for me to conclude that Deralinya is an area or site of particular significance within the meaning of s 237(b).
- [62] The native title party submits that Marlpa tracks are 'of paramount and particular significance to Ngadju people.' In support of this submission, the native title party relies on evidence in the witness statements of Mr John Graham, Mr James Schultz and Mr Adrian Schultz to the effect that Marlpa tracks were used by ancestors of the Ngadju people and knowledge of the tracks has been, and continues to be, passed down through each generation.
- [63] I accept that Marlpa tracks are of cultural and historical significance to the Ngadju people. However, I do not accept that Marlpa tracks as described for the purposes of these objections are necessarily areas or sites of particular significance within the meaning of s 237(b). I have reached this conclusion for several reasons. First, the evidence suggests there are numerous Marlpa tracks throughout claim area, including alternative routes travelling through the same area of country. Secondly, the tracks can be distinguished from rock holes, which the evidence suggests are places where spirits reside and in some cases connected with dreaming stories. Third, whereas the evidence establishes that members of the native title party have obligations to maintain rock holes, it does not suggest that similar obligations exist in relation to Marlpa tracks. Fourth, while there is evidence of cultural concerns regarding interference with rock holes, it is not apparent that similar concerns attach to Marlpa tracks and there is no evidence as to what might constitute interference with the tracks for the purposes of s 237(b). Finally, there is little evidence to support the particular

significance of those parts of the Marlpa tracks that are said to intersect with the proposed licences in this matter.

- [64] The Government party contends that a Marlpa track is neither a 'site' nor an 'area' within the meaning of s 237(b), as it is not a defined track but an undefined route or corridor between particular rock holes. It is difficult to determine on the available evidence whether or not Marlpa tracks do in fact relate to defined areas of country. However, in light of my conclusion that the Marlpa tracks, as described in this matter, are not sites of particular significance, it is not necessary for me to determine whether a Marlpa track or something else of that nature could be regarded as an 'area' or 'site' for the purposes of s 237(b).
- [65] The native title party submits that rock holes are sites of particular significance to the Ngadju people. The native title party states that Ngadju people believe the spirits of their ancestors gather at rock holes, and it is important in Ngadju culture to protect these sites. However, it is difficult to be clear the extent to which rock holes are within the proposed licence areas, and the native title party has adduced little evidence as to the particular significance of specific rock holes. At most, the native title party points to various rock holes located in, or in the vicinity, of E69/3139 and E69/3146, and refers to the evidence of Mr John Graham that rock holes can be found along the escarpment between Israelite Bay and Point Culver.
- [66] Although the Tribunal has previously indicated that the inquiry under s 237 is not restricted to the activities of a grantee party within the area of the proposed future act, it has noted that grantee party activities may only be taken into account in their affects on sites outside a future act area if there is a clear nexus between those activities and the issues to be considered (see *Silver v Northern Territory* at [35]). In the present matter, the native title party has not identified any nexus between activities likely to be undertaken by the grantee party and any potential interference with the rock holes identified inside or near to the proposed licences. In any case, it is clear from Government party documentation and the Tribunal mapping that E69/3139 and E69/3146 are accessible by existing roads and tracks, so it is unlikely that the grantee party will inadvertently disturb any rock holes by attempting to access these areas. Similarly, there is nothing to suggest the grantee party will need to access the escarpment in order to carry out its exploration program on E69/3111.

- [67] The native title party also submits that the Balladonia region (being the area covered by and surrounding E69/3139) is an area of particular significance to the Ngadju people. This submission is made on the basis that the Ngadju people believe that Balladonia is the home of an old white turkey; that Balladonia station and work shed is believed to be an early massacre site; and that many Ngadju people were born and raised in the Balladonia region and have family members buried there, so it is regarded as a special place where Ngadju people can connect to their ancestors.
- [68] I accept that Balladonia is an area where many Ngadju people were born, lived and worked and is, therefore, significant to members of the native title party. I also accept that Ngadju people are buried in the area although, given the lack of evidence regarding specific burial places, I am unable to determine the likelihood of interference with sites of this kind. Despite references in the evidence of Mr Aaron Rule and Mr Adrian Schultz to the old white turkey, its relationship to the native title party's traditions has not been articulated, and I have been unable to evaluate the significance of this evidence.
- [69] In the circumstances, I accept that the work shed is a site of particular significance to the native title party, while noting it is outside the area of E69/3139 and unlikely to be affected by the grant. However, I am not satisfied the 'Balladonia region' in general is an area of particular significance according to the traditions of the native title party, particularly as the area has not been clearly defined. In any event, there is no indication from the evidence or the native title party submissions as to how interference might arise in respect of this area, particularly in the context of existing pastoral interests and the use of infrastructure such as major roads by persons who are not members of the native title party. If there are specific concerns about the effect of exploration on the Balladonia region, they have not been disclosed. I am satisfied the grantee party's approach to matters of cultural heritage will ensure there is unlikely to be any adverse effect on the area; for example, the grantee party's undertaking to avoid any sites nominated by the native title party and to carry out heritage surveys prior to any ground disturbing works. These are now a matter of record and provide some indication that interference of the purposes of s 237(b) is unlikely to occur.

[70] On the basis of the evidence presented, I find the grant of the proposed licences is not likely to interfere with areas or sites of particular significance in accordance with the traditions of the native title holders.

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

[71] The native title party did not make any specific contentions regarding s 237(c) of the Act. Nonetheless, the Tribunal is required under s 237(c) to make an evaluative judgment of whether major disturbance to land and waters is likely to occur (in the sense that there is a real risk of it) from the point of view of the entire Australian community, including the Aboriginal community, taking into account the concerns of the native title party (see *Little v Oriole Resources* at [41]-[57]).

[72] Although no specific evidence has been provided regarding any special topographical, geological or environmental factors that might exist in relation to the proposed licences, I note that a significant portion of E39/3111 has been designated as a proposed national park. Similarly, one of the proposed endorsements on E69/3146 notes that the area affects a rare flora site declared under the *Wildlife Conservation Act 1950* (WA) (*'Wildlife Conservation Act'*). I am satisfied the extra conditions imposed in relation to the area designated for the proposed national park will ensure major disturbance is unlikely to occur. I am also satisfied the grantee party is now on notice about the existence of the rare flora site and can, therefore, take steps to avoid it. In this regard, I note that the *Wildlife Conservation Act* prohibits the taking of any rare flora without the consent of the minister responsible, where 'to take' is defined to include 'to gather, pluck, cut, pull up, destroy, dig up, remove or injure the flora or to cause or permit the same to be done by any means' (see ss 6(1) and 23F(4)). Moreover, the activities of the grantee party will be subject to the various regulatory regimes that exist in relation to mining, environmental protection and Aboriginal heritage, as well as the specific conditions outlined at [20] and [21], which include the requirement to rehabilitate any disturbances made to the surface of the land. There is no evidence to suggest the grantee party will not comply with these regimes or the conditions imposed.

[73] In the circumstances, I am satisfied the exercise of the grantee party's rights under the proposed licences is unlikely to involve major disturbance to the land or waters concerned for the purposes of s 237(c) of the Act.

Determination

[74] The determination of the Tribunal is that the grant of exploration licences E69/3111, E69/3139 and E69/3146 to Platina Resources Ltd are acts attracting the expedited procedure.

Helen Shurven
Member
21 October 2014