NATIONAL NATIVE TITLE TRIBUNAL

John Walter Graham and Others on behalf of Ngadju v Abeh Pty Ltd and Another **[2014] NNTTA 102 (21 October 2014)**

Application No: **WO2014/0145 WO2014/0146 & WO2014/0147**

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 –

The State of Western Australia (Government party)

- and -

Abeh Pty Ltd (grantee 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, 146, 151(2), 237
Mining Act 1978 (WA)
Aboriginal Heritage Act 1972 (WA)

Cases:

Little v Oriole Resources Pty Ltd (2005) 146 FLR 576 *('Little v Oriole Resources')*

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

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

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

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

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

Representative of the native title party:	Mr Andrew Burke, Goldfields Land and Sea Council
Representatives of the Government party:	Ms Shelley Moore, State Solicitor's Office Ms Bethany Conway, Department of Mines and Petroleum
Representative of the Grantee party:	Mr Max Strindberg, Abeh Pty Ltd

REASONS FOR DETERMINATION

[1] On 6 November 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 licences E15/1377, E15/1391 and E15/1393 ('the proposed licences') to Abeh Pty Ltd ('the grantee party'). The notice included a statement that the Government party considers the grants attract the expedited procedure (that is, that the proposed licences are acts that can be done without the negotiations required by s 31 of the Act).

[2] The proposed licences are in the Shire of Coolgardie. The location, claim overlap, and size of each proposed licence are outlined in the table below:

Proposed Licence	*Ngadju Claim Overlap*	*Approximate size (km square)*	*Location*
E15/1377	100%	105.4044	61 kilometres SE'ly of Kambalda
E15/1391	100%	26.3696	25 kilometres SE'ly of Kambalda
E15/1393	100%	84.9709	29 kilometres SE'ly of Kambalda

[3] Each of the proposed licences is wholly overlapped by the Ngadju native title claim (WC 1999/002– registered from 3 March 1999).

[4] 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 for each proposed licence was 6 February 2014, and the four month closing date was 6 March 2014.

[5] On 4 March 2014, John Walter Graham and others on behalf of Ngadju ('the native title party') lodged with the Tribunal expedited procedure objection applications in relation to each of the proposed licences. They were accepted by the Tribunal pursuant to s 77 of the Act on 6 March 2014.

[6] On 1 April 2014, a preliminary conference was held at which the grantee party representative advised that the grantee party wished for the matter to proceed to inquiry before the Tribunal.

[7] On 1 April 2014, I set directions for the inquiry. Pursuant to these directions, the Government party initial evidence was provided on 14 April 2014 through the Department of Mines and Petroleum ('DMP'). Following an amendment to directions on 13 May 2014, the native title party submissions were filed on 24 June 2014 and comprised the following:

- Statement of Contentions dated 24 June 2014 ('NTP Contentions'), including an 'overview map' of the proposed licences
- Affidavit of Mr Giovanni Silvio Fardin, affirmed 24 June 2014 ('Fardin Affidavit')
- Affidavit of Mr John Graham, affirmed 19 September 2013 ('Graham Affidavit')
- Witness statement of Mr Rule Johnson Wicker, dated 3 April 2012 ('Wicker Witness Statement')
- Witness statement of Mr Leslie Schultz, dated 22 March 2012 ('Schultz Witness Statement')
- Witness statement of Mr John Walter Graham, dated 11 May 2012 ('John Graham Witness Statement')
- Witness statement of Mr Justin Scott Graham, dated 22 March 2012 ('Justin Graham Witness Statement')
- Transcript of proceedings in Federal Court matter WG6020 of 1998 and WG6221 of 1998 (Ollan Dimer and Others on behalf of the Ngadju and the Ngadjunngarra from hearings on 7-8 December 2004 and 15-18 June 2009), and transcript of proceedings in Federal Court matter WAD6020 of 1998 and WAD6221 of 1998 (John Walter Graham and Others on behalf of Ngadju and Others from a hearing on 7 May 2012)

[8] 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.

[9] No submissions were received from the grantee party. The Government party provided contentions in reply to the native title party, through the State Solicitor's Office ('SSO') on 22 July 2014 ('SSO Contentions').

[10] 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.

[11] On 7 and 8 August 2014, the Department of Mines and Petroleum and native title party respectively 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. There was no response from the grantee party. I have reviewed the material before the Tribunal and I am satisfied the matters can be adequately determined to proceed 'on the papers'.

[12] A map prepared by the Tribunal's Geospatial services was circulated to parties on 18 August 2014, and no party objected to the Tribunal using the map in the course of this inquiry.

Legal principles

[13] 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.

[14] 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

[15] 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; and
- A Tengraph quick appraisal detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features.

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

E15/1377

- Pastoral Lease 3114/1251 (Madoonia Downs) overlaps 100 per cent; and
- Ground Water Area 21, Goldfields (managed by Department of Water) overlaps 100 per cent.

E15/1391

- Pastoral Lease 3114/1192 (Mt Monger) overlaps 41.7 per cent;
- Ground Water Area 21, Goldfields (managed by Department of Water) overlaps 100 per cent;

- Common CR 17938 overlaps 58.3 per cent; and
- Reserve Lease L352158 overlaps 56 per cent.

E15/1393

- Reserve CR 17171 & 17172 Trigonometrical Station (Department of Development and Regional Lands) overlap less than 0.1 per cent;
- Common CR 17938 overlaps 7.9 per cent;
- CR 18234 for the purpose of water overlaps 24.6 per cent;
- Ground Water Area 21, Goldfields (managed by Department of Water) overlaps 100 per cent;
- Reserve Lease L352158 overlaps 32.5 per cent; and
- Pastoral Lease 3114/1192 (Mt Monger) overlaps 67.5 per cent.

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

E15/1377

- 22 exploration licences, overlapping the proposed licence between 0.1 and 100 per cent) all forfeited, surrendered or expired between 1984 and 2013;
- One mining lease overlapping by 2.3 per cent surrendered in 1990;
- 29 mineral claims overlapping to a maximum of 1.1 per cent, all surrendered, expired or cancelled between 1981 and 1986; and
- 24 prospecting licences overlapping between 0.1 and 1.8 per cent, surrendered or expired between 1986 and 2010.

E15/1391

- Seven exploration licences overlapping the proposed licence at between 10.1 per cent and 100 per cent, surrendered or expired between 1993 and 2013;

- 43 gold mining leases, overlapping between less than 0.1 per cent and 0.4 per cent, surrendered or forfeited between 1921 and 1951;
- Seven mining leases, overlapping between 4.5 per cent and 24.2 per cent, all surrendered between 1990 and 1992;
- 19 mineral claims, overlapping between 0.2 per cent and 4.6 per cent, all surrendered between 1971 and 1982;
- One miners homestead lease, overlapping by 0.3 per cent, forfeited in 1935;
- 22 mineral leases, overlapping between 0.3 and 4.6 per cent, all expired or surrendered between 1976 and 2004;
- 10 prospecting licences, overlapping between 1.3 and 7.3 per cent, all expired or forfeited between 1987 and 2006;
- 19 prospecting areas, overlapping between less than 0.1 per cent and 0.7 per cent, surrendered, forfeited or expired between 1919 and 1948; and
- Four temporary reserves, overlapping between 60.5 and 100 per cent, all cancelled between 1966 and 1975.

E15/1393

- 20 exploration licences, overlapping between 0.2 and 89.7 percent, expired or surrendered between 1991 and 2013;
- One miscellaneous licence, overlapping 0.3 per cent, surrendered in 1989;
- Seven mining leases, overlapping between 0.3 and 11.5 per cent, surrendered between 1991 and 1992;
- 73 mineral claims, overlapping between less than 0.1 and 1.4 per cent, all surrendered between 1971 and 1982;
- Seven prospecting licences, overlapping between 0.4 and 1.8 per cent, all surrendered or expired between 1984 and 1998;

- Three temporary reserves, overlapping between 9.5 and 100 per cent, all cancelled between 1966 and 1972.

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

E15/1377

- Three prospects
- Two minor roads
- Eight tracks (including Binneringie Road)
- Six abandoned/dismantled railways
- 13 fence lines
- One earth dam

E15/1391

- One open pit mine (shut)
- Two mine scraping–detecting areas (operating)
- Two historic mine sites
- Three minor roads
- Eight tracks
- One aircraft landing ground
- One airfield runway
- One earth dam
- One channel/drain

E15/1393

- 20 tracks
- 1 fence line

[19] The report from the DAA Database establishes there are no registered sites or heritage places within the proposed licences.

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

[21] 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 *Tullock v Western Australia* at [11]-[12]), as well as two standard conditions imposed for licences overlapping pastoral or grazing leases. 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.

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] In addition, E15/1391 and E15/1393 have the further following conditions:

E15/1391

7. The rights of ingress to and egress from Miscellaneous Licence 15/80 being at all times preserved to the licensee and no interference with the purpose or installations connected to the licence.

8. 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.

E15/1393

7. The rights of ingress to and egress from Miscellaneous Licence 15/80, 15/85, 15/86, 15/117, 16/118, 15/137 and 15/263 being at all times preserved to the licensee and no interference with the purpose or installations connected to the licence.

8. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on CR 17171 and CR 17172 Trigonometrical Stations and CR 18234 Water.

[23] 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 as to be imposed by the Government party 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'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 Ground Water Areas (GWA 21) the following endorsement applies:

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

[24] The Government party reply 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 ('RSHA condition'), in the following terms (at paragraph 20 Government party contentions):

> In respect of the area covered by the licence, the licensee, if so requested in writing by the Ngadju, the applicants in Federal Court application No. WAD6020/1998 (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 the Ngadju the Regional Standard Heritage Agreement ("RHSA") endorsed by peak industry groups and Goldfields Land and Sea Council.

Native title party submissions

[25] As mentioned at [7] above, the native title party submissions comprise a range of materials including the NTP Contentions, transcripts from Federal Court proceedings related to the native title party's claim, and various affidavits and witness statements.

NTP Contentions

[26] The native title party states that it maintains its objection in relation to s 237(a) and (b) of the Act only (NTP Contentions at paragraph 1.3). 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 community or social activities of the holders on the proposed licences, and likely to interfere with areas or sites of particular significance in the proposed licences in accordance with the native title party's traditions (NTP Contentions at paragraph 1.3).

[27] The NTP Contentions state the following in regard to s 237(a) of the Act (NTP Contentions at paragraphs 3.6-3.9):

a. The Ngadju claim is a community of native title holders who carry on community and social activities in accordance with their traditional law and custom in the area of the proposed licences. In particular:

    i. The native title party hunt, camp, teach children about country and looking after country in the proposed licence areas;

    ii. These activities are an exercise of the native title rights and interests and arise out of the Ngadju's spiritual belief;

b. The native title party state that dislocating Ngadju from the proposed licence area 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. There are a small number of areas in Ngadju country which are designated as Marlpa tracks or 'Ngadju Highways', and these are very important to Ngadju people as they are areas where Ngadju travel, camp and carry out community and social activities constantly. One such Marlpa track intersects the proposed licences E15/1391 and E15/1393, and passes within ten kilometres to the south of proposed licence E15/1377;

    iii. Ngadju people require continuous and unaltered access to Marlpa tracks to undertake their cultural responsibilities including protection of the rock holes and campsites frequently found in these areas;

    iv. Ngadju believe that a failure to look after country and undertake those cultural responsibilities will mean that the environment will be adversely affected and in some cases will result in Ngadju people becoming sick;

    v. Failure to look after country will result in punishment to individuals within the Ngadju claim;

c. The grantee party's activities over the proposed licence areas will interfere with Ngadju people's ability to conduct community and social activities. In particular:

    i. Prevention of Ngadju from accessing country, even for a limited time, will interfere with the Ngadju people's ability to look after country. This is particularly in the case of the Marlpa tracks, which are associated with waterholes and frequent travel by Ngadju people.

[28] The NTP Contentions state the following in relation to s 237(b) of the Act (NTP Contentions at paragraph 4.19-4.22):

a. The proposed licences are located in an area proximate to or overlapping a Marlpa track or 'Ngadju highway'. In particular:

    i. The proposed licences E15/1391 and E15/1393 overlap a Marlpa track;

    ii. The proposed licence E15/1377 is located less than ten kilometres to the north east of the same Marlpa track;

    iii. Marlpa tracks are of paramount and particular significance to Ngadju people;

b. The existence of the Marlpa track within and around the proposed licences, being an area 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 the Marlpa track 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;

    ii. The nature of the sites and places, associated with jukurrpa are such that interference within the proposed licences may impact upon, or interfere with, sites outside of the proposed licences;

c. The fact that the grantee party has executed a copy of the RSHA does not mean that it is unlikely that the future act will interfere with sites or areas of particular significance. In particular:

    i. The RSHA does not address the fact that the mere access to certain sites or places within the proposed licence areas constitutes interference;

    ii. The RSHA, in light of the Marlpa track 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;

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 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.

[29] As the affidavits 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. That is to say, the materials provided refer to the area of the entire Ngadju claim, which is approximately 102,578 square kilometres, compared with the three proposed licences in this matter which are just over 200 square kilometres in size in total. For convenience, I have summarised the material I consider to have some relevance to the issues to be determined in the present matter.

[30] *Affidavit of Mr John 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, checks on rock holes and camping spots (at 25-26).

[31] *Witness statement of Mr John 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 (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 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 also states that he uses fire to burn dead trees and spinifex to promote regrowth and attract animals for hunting (at 142).

[32] *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).

[33] *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).

[34] *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 follows a track between Balladonia and Norseman (at 100).

[35] *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 (Commonwealth Scientific and Industrial Research Organisation), 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).

[36] *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 affidavits and witness statements. I have taken this material into account where relevant.

Grantee party submissions

[37] The grantee party has not provided any submissions in these proceedings.

Government party submissions

[38] The Government party makes a number of contentions regarding particular aspects of the native title party's evidence.

[39] *Affidavit of Mr John Graham*: The Government party states that the affidavit of Mr John Graham was produced for the purpose of the trial proceedings of the claim and not for this inquiry. Accordingly, the affidavit is of a general nature and does not address any of these particular proposed licences. As it is not possible to draw

inferences from this affidavit that are specific to these proposed licences, the Government party contends the affidavit is of little or no use to the Tribunal in this inquiry (SSO Contentions at 33-35);

[40] *Witness statements*: The Government party states that the witness statements were also drafted for the purposes of the claim proceedings in the Federal Court, and therefore, none of the witness statements specifically identify the Marlpa track shown on the overview map provided by the native title party. Moreover, the Government party state there is no evidence of the carrying on of any relevant community or social activities in the area of the proposed licences by its members, nor do they consider the impact of the proposed licences on the Ngadju community or social activities or to significant sites (SSO Contentions at 36);

[41] *Overview map*: The Government party states that the map is not referred to in any of the evidence tendered by the native title party, nor is it annexed to an affidavit or included as part of a statement (SSO Contentions at 37). I do, however, note the overview map is referred to in the NTP Contentions. The Government party states that it appears this map has been produced to demonstrate the existence of a Marlpa track running through, or in the vicinity of, the proposed licences. It goes on to note that this track is referred to in Mr John Graham's affidavit. The Government party submits that the location of the Marlpa track on the overview map is a literal interpretation of Mr John Graham's witness statement, in which he explained there is a Marlpa track between Binneringie and Coolgardie. However, Mr Graham provides no detail as to the route this Marlpa track takes between these two locations, but the overview map depicts its course as a straight line. The Government party notes that in contradiction to this, Mr Leslie Schultz's statement states the Marlpa track between Coolgardie and Norseman includes 'from north to south, Burra Rock, Cave Hill, Sunday Soak and Pioneer Dam' (Mr Schultz's witness statement at 36), and that Mr Schultz's statement is supported by Mr Wicker (Mr Wicker's Witness Statement at 100). The Government party asserts that, following the landmarks named by Mr Leslie Schultz and Mr Wicker, the Marlpa track appears to head directly south from Coolgardie until it is in line with Binneringie, before turning east towards Pioneer Dam and Norseman. Accordingly, the Government party submit that the Marlpa track does not travel near any of the proposed licences (SSO Contentions at 39). The Government party submits

that, at the very least, the location of the Marlpa track in question is not clear and, therefore, is of little or no use to the Tribunal (SSO Contentions at 41).

[42] *Transcript of native title determination*: The Government party states that the transcript material is of limited assistance in this inquiry because it fails to consider the location of the proposed licences, and nor does it consider the impact of the proposed licences on the native title party's activities (SSO Contentions at paragraph 42). It submits that the statements provided by the native title party are not evidence but assertions unsupported by evidence. Further or in the alternative, the statements are too general to be given any, or any significant, weight, or otherwise be relied upon by the Tribunal (SSO Contentions at paragraph 43).

[43] The Government party states the following in relation to s 237(a) of the Act:

- That, on the basis of the affidavits and witness statements, 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 the Ngadju country generally (SSO Contentions at 59);
- There is no evidence that members of the native title party engage in community or social activities within the area of the proposed licences (SSO Contentions at 60);
- The native title party fails to identify a nexus between any community and social activities of the Ngadju and the activities to be undertaken on the proposed licences (SSO Contentions at 61);
- There is no evidence that the areas covered by and surrounding the proposed licences are areas Ngadju use to hunt, camp, teach children about country or look after country (SSO Contentions at 62(a));
    - Mr Leslie Schultz's witness statement refers to his experiences hunting and protecting the land generally, and passing on knowledge to the younger generations, but makes no reference to the proposed licences;

- Mr John Graham's affidavit refers to his father's camp at Binneringie and another at St Ives, but Binneringie is not located near any of the proposed licences and St Ives is already a gold mining area;

- Mr Justin Graham's witness statement refers to his experiences caring for country generally, and camping and hunting in Ngadju country, but makes no reference to any of the proposed licence areas;

- Mr James Schultz's witness statement refers to traditional activities conducted at Mr Jimberlana, which is south of Lake Cowan, and discusses camping at Cave Hill, which is directly south of Coolgardie and west of Lake Lefroy. However, he makes no reference to any of the proposed licence areas;

- While the evidence suggests there are Marlpa tracks running throughout Ngadju country, there is no evidence that a Marlpa track runs throughout any of the proposed licences (SSO Contentions at 62(b) and (c));

- Notwithstanding the above submissions, there is not likely to be direct interference with the native title party's community or social activities because (SSO Contentions at 63):

  - The grantee party has indicated its willingness to enter into an RSHA type agreement with the native title party;

  - E15/1377 has been subject to extensive prior mineral exploration and possibly mining activity, and a pastoral lease covers 100 per cent of the area; E15/1391 has been subject to extensive prior mineral exploration and possibly mining activity, a reserve covers 56 per cent and a pastoral lease covers 41.7 per cent of the area; E15/1393 has been subject to extensive prior mineral exploration and possibly mining activity, a reserve currently covers 32.5 per cent and a pastoral lease covers 67.5 per cent of the area. It is highly likely these activities have affected, and continue to affect, the extent to which community and social activities can be carried out in the relevant areas;

  - There are no Aboriginal communities within the area of the proposed licences;

- Although from time to time the grantee party and the native title party may come across one another in the course of their activities in the proposed licence areas, it is not apparent that the native title party's activities 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;

- Given the limited nature of the rights held by an exploration licensee, there is little prospect of access being prevented in any substantial way; and

- Hunting and exploration activity are, by their nature, inherently capable of coexistence.

[44] The Government party states the following in relation to s 237(b) of the Act:

- There are no registered Aboriginal sites within the proposed licences areas (SSO Contentions at paragraph 72);

- The native title party contends that there is a Marlpa track within the proposed licences E15/1391 and E15/1393, and within ten kilometres of proposed licence E15/1377 at NTP Contentions paragraph 4.19 (SSO Contentions at paragraph 74). The Government party accepts there are Marlpa tracks throughout Ngadju country, however, the evidence of its existence in the overview map provided by the native title party is of little or no use to the native title party, as outlined earlier in this decision at [41] (SSO Contentions at 75-76). [In relation to this point, I regard that the overview map is of some use as it appears to provide a schematic representation of a track in relation to the specific proposed licences in this matter, and the track is referred to in the native title party contentions and in some evidence - however, the difficulty with the overview map is that it is not clear how the map was created (for example, on the basis of whose evidence or by whom), and the actual evidence itself is not clear on the trajectory of the track];

- In any event, the Government party does not accept that the Marlpa tracks are necessarily 'areas or sites of particular significance' within the meaning of s 237(b) of the Act. The Government party states the NTP Contentions fail to explain why a Marlpa track is an area or site of particular significance, and further states 'it is unclear whether [the native title party] is referring to the entirety of the tracks, or just the waterholes'. The Government party refer to Mr John Graham's affidavit (at 116), which states that many *ngarda* (white man) tracks now follow the Marlpa tracks. They say the NTP Contentions regarding s 237(a) of the Act refers to the importance of waterholes located along Marlpa tracks, however, the native title party has not provided any evidence as to the existence of a waterhole located within any of the proposed licences;

- 'An area or site of particular significance' must mean an area that stands out in some way from the general background of other sites and the country as a whole. General evidence that there are or may be places on or near a tenement area which can be said to fit a generic category such as a songline or a secret place is not sufficient to establish that an area or site is of 'particular significance' (at SSO Contentions 78);

- Whether or not something directly interferes with an area or site is a matter for the Tribunal to establish on the evidence. There is no evidence to indicate that the proposed licences will directly impact upon an 'area or site of particular significance' (SSO Contentions at 79);

- Notwithstanding the above submissions, there is not likely to be interference with any sites of particular significance to the native title party (if found) for the following reasons (SSO Contentions at 80):

    - If the Marlpa track is an 'area or site of particular significance', the grantee party is aware of its existence and of 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, and it will be within the native title party's power to require that the RSHA be executed;

- The proposed licences have been subject to prior mineral exploration and possibly mining activity, and are subject to existing underlying tenure as previously outlined at [17];

- The AHA and its associated processes are likely to avoid interference with any area or site of particular significance to the native title holders. In particular, any 'Aboriginal site' as defined in s 5 of the AHA within the proposed licence areas but not on the DAA Register will be protected by s 17 of the AHA (and, for example, the grantee party may not contravene s 17 of the AHA without the consent of the Minister under s18 of the AHA. If the grantee party applied for consent under s 18 of the AHA, the Aboriginal Cultural Materials Committee would need to be satisfied of the adequacy of consultation with any relevant Aboriginal persons, which in this case is likely to include the native title party).

[45] The Government party states the following in relation to s 237(c) of the Act:

- The Government party notes that the native title party do not consider s 237(c) of the Act in the Contentions, however, states this section is only enlivened where there is, in fact, a significant, direct physical disturbance of land or waters. It notes the Act intends physical disturbance to mean digging, drilling or some other means by which the land or waters are moved, removed or diverted (SSO Contentions at 86);

- The Government party contends the grant of any of the three proposed licences is not likely to involve major disturbance to the land or create rights, the exercise of which is likely to involve major disturbance to the land, for the following reasons:

    - The exercise of rights conferred by an exploration licence will be regulated by the State's regimes with respect to mining, Aboriginal heritage and the environment (SSO Contentions at 88(a));

    - Any authorised disturbance to land caused by the grantee party may be mitigated pursuant to proposed conditions requiring rehabilitation of the land following completion of exploration (SSO Contentions at 88(b));

- The area of the proposed licences has been subject to prior mineral exploration and possibly mining activity, and is subject to existing underlying tenure as outlined earlier at [17]. The activities contemplated by the grantee party in the proposed licence areas would be the same as, or no more significant than, the previous use of the areas (SSO Contentions at 88(c)); and

- It does not appear that the proposed licences have any particular characteristics that would be likely to result in 'major disturbance' to the land and waters arising, given the nature of an exploration licence (SSO Contentions at 88(d)).

Considering the Evidence

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

[46] 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]).

[47] 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. For example, Mr Leslie Schultz states that he 'is always taking kids out on bush trips…We go mainly to the rock holes or around the edge of the lakes. These are the key spots' (Leslie Schultz Witness Statement at 123). Similarly, Mr Justin Graham states, '[i]t is important to keep the rock holes clean. When I am down on Ngadju country I like to keep it clean for other people and to keep the animals going', and adds, 'I can go hunting or camping anywhere on Ngadju

country' (Justin Graham Witness Statement at 70-71). However, there is little evidence which links the native title party's evidence of community and social activities in these areas of the Ngadju claim *generally* with the *specific* areas of the proposed licences. I am not satisfied that interference with activities such as hunting, camping, gathering and looking after country is likely to occur in the proposed licence areas on the basis of the evidence provided.

[48] 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. The native title party provide evidence that one of the Marlpa tracks intersects E15/1391 and E15/1393, and passes within ten kilometres to the south of E15/1377 (NTP Contentions at 3.6(b)). Evidence of the location of Marlpa tracks is provided by Mr Leslie Schultz, Mr John Graham and others. Mr Leslie Schultz, for example, indicates that the highway between Norseman and Coolgardie includes, from north to south, Burra Rock, Cave Hill, Sunday Soak and Pioneer Dam (Leslie Schultz Witness Statement at 36). He notes there is another 'Ngadju highway' going from Norseman to Balladonia including Buldania Rocks, Multjania Rock Hole, 10 Mile Rocks, Afghan Rock, Newman Rock and Noondoonia, and also rockholes from Balladonia to Esperance including Horse Rocks, Bromus Dam, Daniels and Moirs Rock (Leslie Schultz Witness Statement at 118-119). He states he has been told there was also a rock hole highway between Balladonia and Israelite Bay, but he does not know these rock holes (Leslie Schultz Witness Statement at 120). Mr John Graham also provides evidence of various Marlpa tracks in Ngadju country generally, as outlined earlier at [31] of this decision (John Graham Witness Statement at 116-128).

[49] However, it is not clear how regularly these tracks are still 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, I cannot accept the native title party's contention (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.

[50] In any event, it is unlikely the grant of the proposed licences and exploration activities, even at their fullest extent, would substantially interfere with the use of Marlpa tracks. It is likely that the grantee party's exploration activities would 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.

[51] 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' (John Graham Witness Statement at 142) and Mr Schultz states that he only carries out burning 'in little patches' (Leslie Schultz Witness Statement at 50). Mr Schultz also gives evidence which suggests that traditional burning practices are restricted by Government regulation. In the circumstances, I am satisfied there is no real risk of interference with traditional burning as a result of the grants.

[52] 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)

[53] 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 at [19], the DAA Database shows there are no registered sites in the proposed licences, and no heritage places. This does not mean there are no sites or areas of particular significance to the native title party within the proposed licences 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.

[54] The native title party submits that Marlpa tracks are ‘of paramount and particular significance to Ngadju people’ (NTP Contentions at 4.19(c)). In support of this submission, the native title party relies on evidence in the witness statements of Mr John Graham and Mr James 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.

[55] I accept that Marlpa tracks are of cultural and historical significance to the Ngadju people. However, I do not accept that the Marlpa tracks raised in this matter 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. In this sense, 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. Second, 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. Third, 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 no evidence to support the particular significance of those parts of the Marlpa tracks that are said to intersect with the proposed licences.

[56] 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 apart from the general descriptions of a tracks trajectory on and near these proposed licences. However, in light of my conclusion that the Marlpa tracks as described in this inquiry are not 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).

[57] 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, the native title party has not identified any rock holes within the proposed licence areas, and has not adduced any evidence as to the particular significance of specific rock holes.

[58] 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 off-site activities may only be taken into account 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 rock holes on or near the proposed licences.

[59] 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, as required by s 237(b) of the Act.

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

[60] No party has made specific contentions regarding section 237(c) of the Act. Nonetheless, 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]).

[61] There does not appear to be clear evidence that the proposed licences have any particular characteristics that would be likely to result in major disturbance to land and waters. I am satisfied, based on the available evidence, the exercise of the grantee party's rights under the proposed licences is unlikely to involve major disturbance to the land or waters concerned, as required by s 237(c) of the Act.

Determination

[62] The determination of the Tribunal is that the grant of exploration licences E15/1377, E15/1391 and E15/1393 to Abeh Pty Ltd are acts attracting the expedited procedure.

Helen Shurven
Member
21 October 2014