NATIONAL NATIVE TITLE TRIBUNAL

Gooniyandi Aboriginal Corporation Registered Native Title Body Corporate v Western Australia and Another **[2014] NNTTA 89 (2 September 2014)**

Application No: **WO2013/0385**

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

- and -

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

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

- and -

The State of Western Australia (Government party)

- and -

AC Minerals Pty Ltd (grantee party)

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

Tribunal: Helen Shurven, Member
Place: Perth
Date: 2 September 2014

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

Legislation: *Native Title Act 1993* (Cth), ss 29, 31, 32, 47, 56, 151(2), 237
Mining Act 1978 (WA)
Aboriginal Heritage Act 1972 (WA)
Mining Regulations 1981 (WA)

Cases: *Balanggarra Aboriginal Corporation Registered Native Title Body Corporate v Bar Resources Pty Ltd* [2014] NNTTA 62 (‘*Balanggarra v Bar Resources*’)

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

Bruce Monadee & Ors (Ngarluma Indjibarndi) and Wilfred Hicks (Wong-goo-tt-oo)/Western Australia/Cossack Resources (2003) 174 FLR 381, [2003] NNTTA 38 (‘*Ngarluma Indjibarndi and Wong-goo-tt-oo v WA*’)

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

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

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

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

Miriuwung Gajerrong #1 (Native Title Prescribed Body Corporation) Aboriginal Corporation/Western Australia/Seaward Holdings Pty Ltd, [2006] NNTTA 74 (‘*Miriuwung Gajerrong #1 v Seaward Holdings*’)

Ned Cheedy and others on behalf of the Yindjibarndi #1/ Western Australia/ Cazaly Iron Pty Ltd [2008] NNTTA 39 (‘*Yindjibarndi #1 v Western Australia*’)

Paddy Huddleston, Lenny Liddy, George Huddleston, Tony Kenyon, Robert Patrick Markham and Gabriel Hazelbane on behalf of the Wagiman, Warai and Jawoyn Peoples/NT Gold Pty Ltd, D J Langley, A J Mazlin and W Falko/Northern Territory [2002] NNTTA 212 (‘*Wagiman, Warai and Jawoyn Peoples v NT Gold Pty Ltd*’)

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

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

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

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

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:	Ms Jacki Cole, Kimberley Land Council Ms Sandi Chalmers, Kimberley Land Council
Representatives of the Government party:	Ms Jasmine Rhodes, State Solicitor's Office Ms Bethany Conway, Department of Mines and Petroleum
Representative of the Grantee party:	Ms Sara Winton, McMahon Mining Title Services Pty Ltd

REASONS FOR DETERMINATION

[1] On 13 February 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 E80/4746 ('the proposed licence') to AC Minerals Pty Ltd ('the grantee party'). The notice included a statement that the Government party considers the grant attracts the expedited procedure (that is, the proposed licence is an act that can be done without the normal negotiations required by s 31 of the Act).

[2] The s 29 notice describes the proposed licence as comprising 62 graticular blocks (approximately 201 square kilometres) with a centroid of 18^{o} 25' S, 126^{o} 10' E, located 66 kilometres south-easterly of Fitzroy Crossing, in the Shires of Derby-West Kimberley and Halls Creek.

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

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

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

[4] The notification day for this matter was 13 February 2013. The three month period for filing a native title claim was 13 May 2013. The four month period for lodgement of objections was 13 June 2013.

[5] The proposed licence is currently wholly overlapped by the Gooniyandi Combined native title determination (WCD2013/003, WAD6008/2000, determined 19 June 2013), with the RNTBC being the Gooniyandi Aboriginal Corporation (*Sharpe v Western Australia*). As a result of that determination, exclusive native title exists over some 80 per cent of the proposed licence, being the area that comprises Mt Pierre Indigenous

held lease. Prior to the native title determination (and at the time of the objection application), the proposed licence was solely overlapped by the Gooniyandi Combined #2 native title claim application (WC2000/010, registered from 23 April 2001).

[6] On 28 March 2013, the registered native title claimant for the Gooniyandi Combined #2 native title claim application (WC200/010) lodged an objection to the expedited procedure application in relation to the proposed licence.

[7] Until the claim was determined on 19 June 2013, the native title party with respect to the proceedings was the registered native title claimant for the Gooniyandi Combined #2 native title claim application (WC200/010) (see s 29(2)(b)(i) of the Act). As the Gooniyandi Aboriginal Corporation RNTBC now holds the determined native title in trust for the native title holders (see *Sharpe v Western Australia*, and s 56(2)(b) of the Act), it is now the native title party in these proceedings (see the Act at s 29(2)(a) and the note at s 30(2) which states 'If a native title claim is successful, the registered native title claimant will be succeeded as a native title party by the registered native title body corporate').

[8] On 2 July 2013, a preliminary conference was held at which the grantee party representative advised they wished to negotiate an agreement with the native title party and requested an adjournment to allow the grantee party time to do so. At the first status conference on 20 November 2013, the grantee and native title parties advised they were still negotiating on the terms of the agreement and requested additional time to complete negotiations. At the second status conference held on 11 December 2013, the grantee and native title parties advised negotiations were 'quite advanced' and requested a further adjournment. At the third status conference held on 22 January 2014, the grantee and native title parties requested another month to negotiate further. The Tribunal convenor noted almost one year had passed since the proposed licence was notified under s 29 of the Act. Accordingly, I set directions for parties to lodge submissions for an inquiry into the objection application. The directions still provided the parties some 15 weeks to negotiate an agreement before a listing hearing would be held on 8 May 2014.

[9] In accordance with the directions, the Government party initial evidence was received on 14 February 2014 through the Department of Mines and Petroleum ('DMP'). The native title party submissions were received on 17 March 2014, the grantee party

submissions on 31 March 2014, and the Government party contentions on 14 April 2014.

[10] At the listing hearing held on 8 May 2014, the parties' representatives agreed they had no further submissions and the matter could proceed to be heard 'on the papers' in accordance with s 151(2) of the Act.

[11] A map and an overlap analysis prepared by the Tribunal's Geospatial services ('Tribunal Overlap Analysis') of the proposed licence were circulated to parties on 13 June and 3 July 2014 respectively. A second map, delineating the boundaries of the pastoral leases was also prepared by the Tribunal's Geospatial services and circulated to the parties on 1 August 2014. No party objected to the Tribunal using the maps or the overlap analysis in the course of this inquiry.

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

Legal principles

[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 Webb QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (at [15]-[21]).

Evidence in relation to the proposed act

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

- A DMP Tengraph plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity of the proposed licence;

- 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 DMP Tengraph Quick Appraisal detailing the land tenure, current and historical mining tenements, native title areas, relevant services, and other features within the proposed licence ('DMP Quick Appraisal').

[16] The DMP Quick Appraisal notes the following interests overlapping the proposed licence:

- Mt Pierre Indigenous held pastoral lease I 398/806, overlapping at 80.5 per cent;

- Fossil Downs pastoral lease 3114/1248, overlapping at 9.1 per cent;

- Gogo pastoral lease 398/810, overlapping at 2.5 per cent;

- Common reserve 22256 being a 'Stock Route' and managed by the Department of Regional Development and Lands, overlapping at 2.9 per cent;

- Common reserves 1584 and 1585 being 'Watering Places' and managed by the Department for Planning and Infrastructure (DPI), overlapping at 1.3 and 1.1 per cent respectively;

- Common reserve 23897 being the 'Fitzroy Crossing to Mount Krauss Stock Route' and managed by the DPI overlapping at 0.2 per cent;

- Four Vacant Crown Land parcels overlapping at no more than 1.6 per cent in total; and

- Road Reserve No. 296 overlapping at no more that 0.1 per cent.

[17] Mapping provided by the Tribunal's Geospatial Unit and circulated to the parties shows a graded road running from Fitzroy Crossing and through the proposed licence in a south easterly direction along the Reserve 23897 route in the north, and through the middle of the lower half of the proposed licence. The mapping also shows those portions of the proposed licence overlapped by Fossil Downs and Gogo Stations, which comprise a large portion of the very northernmost part of the proposed licence along some of the banks of the Margaret River. All other parts of the Margaret and Louisa Rivers that are located within the proposed licence are also within the Mt Pierre Indigenous pastoral lease.

[18] According to *Sharpe v Western Australia* (at [5] schedule 3) exclusive native title exists over Mt Pierre Indigenous owned lease. The Tribunal Overlap Analysis indicates exclusive native title exists over 80.42 per cent of the proposed licence. There is a discrepancy of 0.08 per cent between the Tribunal Overlap Analysis and the DMP Quick Appraisal regarding the Mt Pierre lease. I do not believe anything turns on this discrepancy.

[19] According to *Sharpe v Western Australia* (at [6]) non exclusive native title exists over Fossil Downs pastoral lease, Gogo pastoral lease, and Common Reserves 1584, 1585, 22256 and 23897. The Tribunal Overlap Analysis indicates non exclusive native title exists over 18.77 per cent of the proposed licence. In these areas, the native title party holds the following non exclusive native title rights (see *Sharpe v Western Australia* at [6]):

> (a) the right to access and move freely through and within each part of the Determination Area referred to in Schedule Four;
> (b) the right to live, being to enter and remain on the land, to camp and erect shelters and other structures for that purpose;
> (c) the right to:
> (i) hunt, gather and fish for personal, domestic and non-commercial communal needs;
> (ii) take flora and fauna;
> (iii) take other natural resources of each part of the Determination Area referred to in Schedule Four including soil, sand, clay, gravel, ochre, timber, resin and stone for personal, domestic and non-commercial communal needs;
> (iv) share and exchange natural resources of each part of the Determination Area referred to in Schedule Four including soil, sand, clay, gravel, ochre, timber, resin and stone for personal, domestic and non-commercial communal needs;
> (v) light contained fires for domestic, cultural and spiritual purposes but not for the clearance of vegetation;
> (vi) engage in cultural activities in the area, including the transmission of cultural heritage knowledge;
> (vii) conduct ceremonies;
> (viii) conduct burials and burial rites;
> (ix) hold meetings;

> (x) visit, maintain and protect from physical harm, places and sites of importance in each part of the Determination Area referred to in Schedule Four; and
> (xi) access and take water and its resources for personal, domestic or non-commercial communal purposes, and for the sake of clarity and the avoidance of doubt, this right does not include the right to take or use water lawfully captured or controlled by the holders of pastoral leases numbered 3114/1248 (Fossil Downs), 3114/1257 (Christmas Creek), 3114/1263 (Margaret River), 398/800 (Larrawa), 398/806 (Mt Pierre), 398/807 (Bohemia Downs), 398/808 (Louisa Downs) and 398/810 (Gogo Station)

[20] According to the Tribunal Overlap Analysis, two registered Indigenous Land Use Agreements (Body Corporate Agreements) overlap the proposed licence: WI2013/008, between the native title party and Fossil Downs leaseholders; and WI2013/011, between the native title party and Gogo Station leaseholders. The Tribunal's Register of Indigenous Land Use Agreements notes both Body Corporate Agreements were registered on 7 January 2014, they relate to the entirety of each pastoral lease, and cover 'Access, Communication, Terms of Access'.

[21] According to the DMP Quick Appraisal, the interests (as listed at [16]) total no more than 99.3 per cent of the proposed licence: it appears there is a technical void of approximately 0.7 per cent in DMP data. As noted previously, there is also a discrepancy of 0.08 between Tribunal and DMP geospatial calculations of the Mt Pierre station overlap. According to the Tribunal Overlap Analysis, native title is extinguished over 0.81 per cent of the proposed licence. It is reasonable to assume that this extinguishment area may be a technical overlap, and nothing turns on these nominal data differences.

[22] According to the DMP Quick Appraisal, 99.3 per cent of the proposed licence falls within the West Kimberley National Heritage Listing (West Kimberly 106063). Other notable interests in the Quick Appraisal are:

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

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

- Two surrendered exploration licences held from 1983 to 1984 and from 1989 to 1993 overlapping at less than 0.1 per cent each;

- 15 surrendered mineral claims, held for no more than seven months between 1979 and 1982, overlapping at no more than 0.6 per cent each;

- Two cancelled temporary reserves held from 1920 to 1921 and from 1963 to 1973, overlapping at 100 per cent each; and

- Three cancelled temporary reserves held between 1969 and 1979, overlapping at 16.9, 8.1 and 6.6 per cent.

[24] Previously granted mineral tenure notified under the Act prior to the registration of the native title party's claim application is:

- Five exploration licences held from 1996 to 1997, 1996 to 2000, 1998 to 1999, 1998 to 1999, and 2001 to 2003, overlapping at 14.5 per cent, 20.9 per cent, 36.8 per cent, 34.1 per cent an 0.8 per cent

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

- E04/1205 granted in 2002 and surrendered in 2008 overlapping at 1.6 per cent. Tribunal records show objection WO2001/0278 was lodged by the native title party on 20 August 2001 and was withdrawn on 1 October 2002 via an agreement with the grantee party for that matter.

- E04/1209 granted in 2002 and expired in 2008 overlapping at 3.2 per cent. Tribunal records show objection WO2001/0583 lodged by the native title party on 17 December 2001 and was withdrawn on 1 October 2002 via an agreement with the grantee party for that matter.

- E04/1205 granted in 2002 and surrendered in 2008 overlapping at 1.6 per cent. Tribunal records show objection WO2001/0278 was lodged by the native title party on 20 August 2001 and was withdrawn on 1 October 2002 via an agreement with the grantee party for that matter.

- E80/2653 granted in 2002 and surrendered in 2003 overlapping at 63.6 per cent.

- E80/3631 granted in 2007 and surrendered in 2008 overlapping at 9.7 per cent. Tribunal records show objection WO2006/0574 was lodged by the native title party on 6 November 2006 and was withdrawn on 15 June 2007 via an agreement with the grantee party for that matter.

- E80/4312 granted in 2010 and surrendered in 2012 overlapping at 46.8 per cent. Tribunal records show objection WO2010/0589 was lodged by the native title party on 5 May 2010 and was withdrawn on 28 June 2010 via an agreement with the grantee party for that matter.

[26] It is clear from the above that some recent exploration activity has occurred in some of the proposed licence via agreements between various grantee parties and the native title party.

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

- Two undeveloped prospects/drillholes (Minnie Pool 1 and 2);
- Geodetic survey marker SSM-J 7;
- Five unnamed minor roads;
- 51 tracks;
- Four fence lines;
- Two yards (one named ‘Black Hills Yard’);
- Frog Bore;
- One perennial permanent Lake;
- 24 non perennial major watercourses including Margaret River and Louisa River;
- 81 non perennial minor watercourses; and
- 17 springs, soaks, waterholes or pools including Minnie Pool.

[28] The report from the DAA Database shows one registered site and one heritage place within the proposed licence:

- Site 12940 - Minnie Pool, containing painting, grinding patches/grooves, open access, no gender restrictions; and

- Heritage Place 12566 – Wunamal/Mueller Ranges

According to Tribunal mapping, Minnie Pool is partly on Reserves 1584 and 23897 and sits in the northwest portion of the proposed licence. And the Wunamal/Mueller Ranges appear to be a very large other Heritage place, which slightly overlaps the proposed licence at part of its south easterly border.

[29] According to mapping prepared by the Tribunal, Galeru Gorge Aboriginal community located at Mount Pierre Homestead lies approximately 20-25 kilometres south of the proposed licence. Five other Aboriginal communities are scattered some 15 kilometres south of Galeru Gorge (including Mimbi, Ngumpan and Mingalkala), and 14 communities are located in and around the vicinity of Fitzroy Crossing, which is situated approximately 66 kilometres northwest of the proposed licence.

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

> 1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion;
> 2. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP;
> 3. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program;
> 4. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.
> 5. The Licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.

6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
   - the grant of the Licence; or
   - registration of a transfer introducing a new Licensee;

   advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.
7. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Watering Place Reserves 1584 and 1585.
8. No interference with Geodetic Survey Station J7 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

Consent to explore on Stock Route Reserves 22256 and 23897 granted subject to:

9. No exploration activities being carried out on Stock Reserves 22256 and 23897 which restrict the use of the reserves.

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

1. The Licensee's attention is drawn to the provisions of the *Aboriginal Heritage Act 1972* and any Regulations thereunder.
2. The Licensee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.

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

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

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

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

In respect to Waterways the following endorsement applies:

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

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

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

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

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

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

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

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

Submissions of the native title party

[32] The submissions of the native title party include: a statement of contentions; the affidavit of Mr Jimmy Shandley sworn 13 March 2014; and the affidavit of the native title party representative legal officer Ms Barbra Friedewald sworn 17 March 2014. Annexed to Mr Shandley's affidavit is a satellite imagery map showing the Galeru Gorge Aboriginal Community, DAA site and heritage place locations, Mount Pierre Creek, Louisa River, Leopold River, Margaret River, Palm Spring Creek and the proposed licence which is demarcated with a green border. Also annexed to Mr Shandley's affidavit are three photos showing individuals said to be in the proposed licence, undertaking activities of camping, driving a tractor on a road, and getting sap from a tree, respectively.

[33] Mr Shandley states his connection to 'Gooniyandi country' and the area of the proposed licence is via his father's grandmother and his mother's great grandmother (at 3-4). He deposes 'I have also gone and spoken to senior Gooniyandi men who also speak for this country including Sean Cox and Billy Chestnut. The[y] have supported me in writing this affidavit' (at 78). He also deposes he is a Director of the Gooniyandi Aboriginal Corporation RNTBC and manager of Mount Pierre station (at 2 and 9). As such I accept he has authority to speak on behalf of the native title party for the country which is subject to the proposed licence.

Submissions of the grantee party

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

Submissions of the Government party

[35] The Government party makes contentions relating to all three limbs of s 237 which will be addressed further in this decision.

Considering the Evidence

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

[36] The Tribunal is required to make a predictive assessment as to whether the grant of the proposed licence and activities undertaken pursuant to it are likely to interfere with the community or social activities of the native title party (in the sense of there being a real risk of interference) (see *Smith v Western Australia* at [23]). Direct interference involves an evaluative judgement that the future act is likely to be the proximate cause of the interference, and must be substantial and not trivial in its impact on community or social activities (see *Smith v Western Australia* at [23]).

[37] The grantee party states it 'plans to undertake the usual activities associated with exploration licences' and contends exploration work is of a 'low-level, temporary nature' (citing *Martu Idja Banyjima v Western Australia* at [30]). Whilst it lists what it contends are the 'usual activities', the grantee party provides no detailed information regarding the particular exploration work planned for the proposed licence. Therefore, it is open for me to infer that the grantee party will exercise their rights under the *Mining Act 1965* (WA) ('Mining Act') to the full (see *Silver v Northern Territory* at [25]-[32]; *Ngarluma Indjibarndi and Wong-goo-tt-oo v WA* at [17]), and I do make that inference.

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

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

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

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

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

licence has occurred subject to negotiated agreements between the native title party and each grantee party involved, with the exception of one tenement.

[41] As noted previously, the DMP quick appraisal shows 80.5 per cent of the proposed licence is overlapped by Mt Pierre Indigenous owned lease. In this area, the native title party holds 'an entitlement as against the whole world to possession, occupation, use and enjoyment of the land and waters of that part to the exclusion of all others' by operation of s 47 of the Act ('exclusive native title') (*Sharpe v Western Australia* at [5], schedule 3**)**. According to the Tribunal Overlap Analysis, that area comprises 80.42 per cent. With the exception of what might be a technical overlap of 0.81 per cent in which native title does not exist, the native title party holds non exclusive native title rights over the remainder of the proposed licence. The majority of this remainder area is subject to Body Corporate Agreements between the native title party and the leaseholders of Gogo and Fossil Downs pastoral leases, comprising 11.58 per cent of the proposed licence. Whilst the details of the Body Corporate Agreements are not publically available, the Tribunal's Register of Indigenous Land Use Agreements notes the agreements cover "Access, Communication, Terms of Access" which have been agreed to between the native title party and the leaseholders.

[42] The native title party contends the Tribunal has held that native title parties may have greater ongoing access to areas which are covered by an indigenous held lease (citing *Bunuba v Western Australia* at [52]-[53]). In that matter, the Tribunal found the usual risk assessment factors of the ongoing lawful activities of pastoralists prevailing over native title rights did not automatically occur, but still noted the importance of the native title party's evidence. The native title party in this matter contends (at 32):

> the significance of the fact that the Area is mostly under indigenous management is explained in the Shandley affidavit at [13]:
>
> > Mt Pierre Station is Aboriginal owned and managed, and as Gooniyandi people we have exclusive possession native title over this country. This is very important to us because it means we control who comes in and out of our country. We don't have to go through any kardia (non-Indigenous) pastoral managers to access this country.

[43] The grantee party contends that whilst some of the activities noted in Mr Shandley's affidavit 'relate to the community and social activities of the NTP, some are not related to native title rights and interests but more to the commercial use of the Mt Pierre Pastoral Lease...The Grantee Party respectfully submits that the management of the Indigenous Pastoral Lease is not classified as a community or social activity in

accordance with the traditional law and customs of the Native Title Party' (at 33-34, citing *Wagiman, Warai and Jawoyn Peoples v NT Gold Pty Ltd*).

[44] In relation to that argument, I note in *Miriuwung Gajerrong #1 v Seaward Holdings***,** the Tribunal noted (at [31]):

> The first issue raised by...business activities is whether they arise from the determined native title rights and interests. In *Silver v Northern Territory of Australia* [2002] NNTTA 18; (2002) 169 FLR 1 after analysis of the meaning of the words 'community or social activities' Member Sosso concluded that the Tribunal's inquiry is not directed at ascertaining the likely interference with activities per se, but, rather, those activities which are a manifestation of claimed native title rights and interests (at [58]; adopted in Walley at [13]-[14]).

That decision went on to explain Member Sosso's reasoning in that:

> I do not read section 237(a) as providing an invitation to investigate all community and social activities of native title holders. Not only must the community or social activities be carried on by such holders, they must be activities that identify those persons as native title holders. The suggestion that provided there are community or social activities carried on by native title holders, irrespective of the nature of those community or social activities, section 237(a) comes into play, ignores the whole scheme and purpose of the legislation

[45] Whilst I accept the grantee party's contention that the management of an Indigenous Pastoral Lease is not classified as a community or social activity in accordance with the native title party traditional law and customs, Mr Shandley's affidavit evidence suggests that pastoral interests are integrated with the exercise of the native title party's exclusive native title rights and interests. For example, he states:

- 'When I am doing this work on the station...I will often take along my children and grandchildren and teach them what I know about the country and our culture' (at 16);

- Whilst grading the road last year, his wife and granddaughter came with him and 'she kept pulling us up to stop so she could collect all the bush tucker. This is important she knows this, so...she can survive' (at 16, 32); and

- 'The [Gooniyandi] Rangers came out onto this country last year. I showed them some of the country and they helped me with fencing' (at 18).

[46] In *Balanggarra v Bar Resources*, a matter which considered an Indigenous Pastoral Lease, I found evidence indicated, '... that pastoral interests are closely managed by senior members of the native title party and are integrated with their exclusive native title rights and interests' (at [45]). I make a similar finding in this present matter in relation to the activities of: travelling through the area for camping, gathering bush tucker, fishing and hunting; teaching community members about traditional ways; and

looking after sites (the sites of which are dealt with in consideration of s 237(b). I do not find the following activities to be social and community activities in relation to the native title party traditions in the present matter: fixing up the homestead and the station assets; checking stock and fencing.

[47] Mr Shandley's access 'every second day' for pastoral related work lends further weight to the native title party's claimed use of the proposed licence:

- 'I also go and see people who are fishing on *Yalu* [Louisa River] and *Mailngyia* [the part of Margaret river west of the junction where it meets Louisa River] to make sure they're doing the right thing. Lots of Gooniyandi people go fishing along the Margaret River in the northern part of the Exploration Licence Area from Bayulu and other communities. From there, it is only a 30-40 minute drive' (at 15) - I note Bayulu is one of the group of communities near Fitzroy Crossing.

- 'I talk about my family in this affidavit, but it is not just my family who goes to these sites, there are other Gooniyandi people who know these places and go there too. For instance I know the Till family who live in Mingalgaliwa Community and the Hobbs who live in Ngumpan also know these parts of the country and their families go fishing and hunting there too. Our young people love fishing and hunting and exploring. We are teaching them the protocols about what you do when you're on country' (at 17).

- 'In between Shady Bore and Blackhills, in the northern part of the Exploration Licence Area, along the Margaret River, there is one of our main fishing spots which is called *Yoowili*. We go camping and fishing there all the time. Especially in the dry season there are Gooniyandi people fishing there every week.....I know, for instance, our grandson Lyle was there fishing just last week. On that trip he caught one barramundi and missed one other. He also came back with a couple of *wawarnyi* (goannas)' (at 19-20).

- 'On our last trip to the Exploration Licence Area, I showed my grandchildren how you can eat sap from the *birriwirri* tree. The western name for the *birriwirri* tree is the gumtree. We also collect the sap from the *warrarlu* (Coolabah tree). The young *birriwirri* trees have really nice and sweet [sic] and the kids go mad for them' (at 28).

- ‘There is another tree called *munduwa* which we get sap from. This tree doesn’t grow on the Fitzroy River, it just grows on hilly country like along the Louisa and Margaret River in the Exploration Licence Area’ (at 29).

- ‘The country around Pot Hole, which is in the centre of the Exploration Licence Area, is really good for collecting *nanjarli* [bush tomato]. There is also a tree we call *brialli* (konkerberry) which has little blackberries’ (at 32) (I do note, however, that Pot Hole as a place is not marked on the mapping associated with this matter).

- ‘In around December last year, before the wet came, I went with grandchildren to the junction between Palm Spring and the *Yalu* [Louisa River] which is in the very southern corner of the Exploration Licence Area. We took two carloads which included took [sic] two of my grandsons...and a number of other kids including their cousin...’ (at 62).

- ‘we go hunting for *wawanyi* (goannas) in the Exploration Area...I went hunting for *wawanyi* with Cindy [goanna dog] just a few weeks ago’ (at 35, 39).

[48] Mr Shandley states ‘because there are so many important hunting and fishing spots in the Exploration Licence Area, the Gooniyandi people on the country will be always running into any mining mob working in the area. We want to have good relations with anyone coming onto this country, to make sure we can still do our fishing and hunting, and to make sure that they don’t damage our country’ (at 77). The affidavit Ms Barbra Friedewald, the native title party’s legal representative, attests to unsuccessful negotiations with the grantee party over an agreement related to this matter. The Government party rightly contends the ‘application of the expedited procedure, however, is not concerned with obtaining the agreement of the native title party to the act’ (at 95, citing *Yindjibarndi #1 v Western Australia*), and I accept their contention in this respect.

[49] With reference to the native title party’s evidence regarding fishing, the grantee party contends ‘the vast majority of the Margaret River is not located within the tenement area, and a significant portion of the Louisa River is also not located within the Tenement area’ (at 44). Whilst this is true, the native title party evidence refers specifically to *Mailngyia*, the area along Margaret River west of the junction with Louisa River. According to Tribunal mapping, this area is largely within the proposed

licence. Furthermore, the mapping shows a significant portion of the Louisa River is also within the proposed licence. The grantee party contends 'only a portion' of *Yoowili*, the area along Margaret River between Shady Bore and Blackhills, is located within the proposed licence (at 43). I do not accept that contention as Tribunal mapping clearly shows the majority of that area is within the proposed licence.

[50] The grantee party refers to the Government party's proposed endorsements relating to waterways to contend it is unlikely to interfere with the native title party's fishing activities, notably endorsements 7, 8, 9 and 10 which: require advice from the Department of Water if work is proposed within 30 or 50 metres of any seasonal or perennial waterway; and prohibit any abstraction, obstruction or interference unless a licence is first obtained. However, the native title party contends that, unlike the proposed conditions, the grantee is not liable to forfeit the proposed licence should they breach any of the proposed endorsements. Also as counter to the grantee party contention, the native title party submits the 'regular camping and fishing trips' are a combined activity at real risk of interference (at 19-20), citing *Tullock v Western Australia* (at [112]):

> If a native title party regularly camps at a particular spot and the explorers wish to establish an exploration camp at the same place and drill or use earthmoving equipment in the near vicinity of it then it can readily be said that there is a real risk that the community and social activities would be directly interfered with. On the other hand, it is difficult to see how the establishment of such a camp would interfere with the native title party's ability to carry on the community activities associated with looking after country which have been identified and relied on by the native title party in a direct or proximate way.

In the present matter, the native title party do not solely rely on evidence regarding looking after country, but rely on evidence that in doing their community and social activities of hunting, gathering, and particularly fishing, they may run into the grantee party and their activities may be interfered with to a substantial extent.

[51] The Government party contends hunting and mineral exploration activities are, by their very nature, inherently capable of coexistence. It contends the Tribunal has on numerous occasions found that to be the case and has determined the grant of an exploration licence is not likely to interfere with hunting. It contends '[i]n the absence of particular and very unusual evidence suggesting otherwise (there is none in this case) it should do here' (at 64(g)).

[52] The focus of the s 237(a) inquiry is the consequences of the grant of the proposed licence on the carrying on of community or social activities of the native title party,

who, in this instance hold, for the main, exclusive native title rights over the area of the proposed licence. The activities must be of a community and social nature, not necessarily limited to a localised community and the interference must be substantial in nature. As summarised by President Webb QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara*, 'there needs to be quantifiable evidence before the Tribunal of ongoing community and social activities on, or having a nexus with, the relevant area in order to assess whether there is a real risk of those activities being adversely affected by the exploration activities if the grant is made' (at 59). Applying these principles, I do not think there is sufficient evidence to indicate that the social and community activities of the native title party will be interfered with in relation to: looking after sites; some plant gathering activities (which are not necessarily restricted to this proposed licence); activities at Pot Hole (which is said to be at the centre of the proposed licence but which does not appear on Tribunal mapping and so it is difficult to draw any conclusions in relation to that area); and the hunting of goannas (which I could not say is isolated to this particular proposed licence or done in an intensive way on this proposed licence).

[53] However, I do accept that:

- the evidence shows that members of the native title party manage and control the Mt Pierre Indigenous pastoral lease alongside their exclusive native title rights and interests (Mr Shandley affidavit at 2 and 13). There are no other current interests over the proposed licence which may affect the native title party's community and social activities or exclusive possession (as per the DMP Quick Appraisal);

- the majority of the remaining portion of the proposed licence in which non exclusive native title exists comprises Gogo and Fossil Downs pastoral leases. The native title party has successfully negotiated two Body Corporate Agreements with the leaseholders regarding access and communication;

- members of the native title party live at Mt Pierre homestead, as well as Galeru Gorge, Mimbi and Mingalkala (Mr Shandley affidavit at 11 and 17). The communities are located between 25 and 40 kilometres south of the proposed licence and within the boundaries of Mt Pierre Indigenous pastoral lease, and within easy access of the proposed licence, suggesting such an area may be used more intensively than other parts of the native title party determined area;

- sap is collected from munduwa trees on country which while not being unique to this area, does have particular characteristics found within the proposed licence (Mr Shandley's affidavit at 28 and 29);

- the evidence indicates the area is readily accessible via vehicle (Mr Shandley affidavit at 11, 12, 15, Tribunal mapping, DMP Quick Appraisal), and members of the native title party come to the area from Bayulu and other communities located 30-40 minutes away via vehicle, to camp, fish and hunt goannas (Mr Shandley affidavit at 15, 17, 19-20, 35, 39); and

- members of the native title party use the area to pass on generational knowledge about the area (Mr Shandley affidavit at 17, 26, 32, 52, 60, 64, 73).

[54] The question is would the allowable activities of the grantee party (as outlined at [38]-[39]), interfere with these social and community activities of the native title party (as outlined at [53]) in a substantial way.

[55] Condition 5 which is to be imposed on the grant of the proposed licence indicates that the grantee party must notify pastoral lease holders prior to doing any ground disturbing activities or airborne surveys. This includes when the grantee party proposes utilising any equipment such as scrapers, graders, bulldozers, back hoes, drilling rigs etc. Arguably then, once the native title party was notified such was to be used, they could organise social and community activities bearing in mind the notification of where the grantee party activities are proposed to be conducted. However, I note fishing activities are described in a way which suggests they are undertaking intensively, due to the proximity of the waterways and communities. I also note: the passing on generational knowledge about the area; collecting sap from munduwa trees; that members of the native title party manage and control the Mt Pierre Indigenous pastoral lease alongside their exclusive native title rights and interests; and that there are no other current interests over the proposed licence which may affect the native title party's community and social activities or exclusive possession (as per the DMP Quick Appraisal).

[56] Given these activities, the number of communities within easy travelling distance, the existence of water and easy road access in the proposed licence to facilitate activities, particularly such as fishing, it is understandable that these community and social activities would be conducted in such a way that they could be substantially interfered

with by the grantee party. The grantee party activities in this matter are largely unknown as to their particulars.

[57] I note also an important consideration is the exclusive nature of the native title party's determined holdings over the proposed licence. Given the existence of the road and tracks on the proposed licence, which the grantee party would also no doubt be using in the pursuit of their own exploration activities, it is likely that the native title party and the grantee party would meet each other regularly. I agree with the grantee party and Government party that grantee party activities, even were they to be exercised to their full extent, are unlikely to interfere substantially with hunting goanna as it is likely that activity can be done elsewhere. However, in relation to fishing, for example, the grantee party have not said they won't be doing work near waterways and refer to endorsements which require advice from the Department of Water or licences to allow them to interfere with waterways. It is not clear whether the grantee party will apply for such licences or such advice from the Department of Water. As such, it is possible the activities of the grantee party could cause substantial interference to fishing activities of the native title party. For example, in *Silver v Northern Territory* (at [57]), it was stated that 'it would not be enough if only isolated members of a community were upset about the proposed future act. There would have to be evidence that the doing of the act would be likely to substantially interfere with the community or social activities of the native title holders'. I believe, for the reasons outlined above, such evidence exists in this matter.

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

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

[59] In relation to s 237(b), the issue the Tribunal is required to determine is whether there is likely to be (in the sense of a real chance or risk of) interference with areas or sites of particular (that is, more than ordinary) significance to the native title party in accordance with their traditions. As stated above at [28], the DAA Database shows one registered site and one heritage place in the area of the proposed licence. This does not mean there may not be other sites or areas of particular significance to the native title

party within the proposed licence or in the vicinity. The Register of Aboriginal Sites does not purport to be a record of all Aboriginal sites in Western Australia, and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters.

[60] Mr Shandley's affidavit deposes the following sites within the proposed licence connected to the *Gunianbarrarra* (Kangaroo) Dreaming story (at 40-41):

- 'The yellow line which crosses over the south western [sic-eastern] part of the Exploration Licence Area is a registered Heritage Site [sic-Heritage Place] with the Department of Aboriginal Affairs ('DAA') which was created for the *Gunianbarrarra* story. The story doesn't stop where this line is though, and goes right through the Exploration Licence area and then further South' (at 41).

- 'a plain in the south east part of the Exploration Licence Area which is where that Kangaroo went to sleep along his journey. This plain is in part of the country we call *Binduwa*' (at 47).

- 'areas of Quartz rock in the southern part of the Exploration Licence area, south of *Binduwa* (Mt Huxley area). The quartz rocks are the Kangaroo's *garna* (poo)' (at 46).

- *Walarri* (mud spring) 'just on the south-east border of the Exploration area. That place where he dug for water is now a place with living water...even in the dry' (at 48).

[61] The evidence indicates that the sites and areas connected with the *Gunianbarrarra* (Kangaroo) Dreaming are of particular significance to the native title party. Mr Shandley himself deposes the story is 'very significant'. He states: the 'kangaroo in the Gooniyandi PBC logo represents this story and it's there because it's is one of our main stories' (at 40); 'Gooniyandi and Walmajari boys learn about this story and sing this song at law time' (at 44); and 'You can sit down with every Gooniyandi and every Walmajari elder and they will tell you this same *Gunianbarrarra* story' (at 53). Furthermore, he states that unauthorised entry to or damage to sites connected to the story might result in tribal punishment: 'This is not only from the Gooniyandi side, but also from the Kija and Walmajari who share that story. It would be a very serious thing for me' (at 55). Mr Shandley states he was only able to 'talk a little bit about this story'

because ‘the details of this story are secret and can only be known and talked about by men who have been through the law’. As a result, he states it may be that there are other sites or areas within the proposed licence connected to the *Gunianbarrarra* story (at 42), although I can draw no conclusions about such other sites in the absence of evidence.

[62] Mr Shandley also states ‘I know a lot of important places in the Exploration Licence Area which have evidence and artefacts from our ancestors’ (at 56). He offers the following by way of example:

- A site at *Galyarri* (Minnie Pool) registered by the DAA with ‘flints, grinding stones and paintings...by our old people’ (at 56)

- The junction between Palm Spring and *Yalu* (Louisa River) ‘where my old people have collected rocks and been flinting, making axes and spear heads’(at 63)

[63] Evidence suggests the above sites are of some significance to the native title party. Mr Shandley states these two sites, and others containing ‘artefacts and evidence from our old people’ (at 57), are ‘important sites in the Exploration Area [and] if these artefacts are damaged we lose the spirits of the area which makes these places special. We need to leave it as it is’ (at 58). He states ‘A lot of these sites aren’t registered and only we know where they are’ (at 59).

[64] Additionally, the following sites are described by Mr Shandley as ‘very important’, ‘sacred’ or ‘dangerous’ and within the proposed licence (at 65-74):

- *Gilulu,* an area of limestone within *Marrangany* (Sparke Range) and in the middle of the proposed licence. ‘This area has a cave which is a very important site. There are burial remains in this site and women and children shouldn’t go near this site. If you didn’t know it was there, you would never see it, and you might damage it or get too close’ (at 66).

- *Damurrumurru,* within *Marrangany* (Sparke Range) *and* in the middle of the proposed licence. ‘Inside that area there are very significant caves which have human bones kept in them which are wrapped up in paperbark the traditional way. There are also paintings inside those caves’ (at 68).

- A ‘very important cave site between *Yoowili* and Shady Bore’ on the southern side of Margaret River. ‘In the cave are sacred objects.... Anything inside this cave is stored away so they can be kept secret’ (at 70).

- *Gurninggyir,* ‘another cave site with burial remains and paintings’ on the northern side of Margaret River (at 72).

- ‘those hill areas’ near the fishing spots along Margaret River. ‘We don’t let kids go near these sites, and when we go and visit them the women usually stay behind’ (at 73).

- Other ‘Mens sites’ ‘in the tenement area which women can’t go’ (at 74).

[65] The evidence indicates the native title party are obliged to care for the above sites, some of which are dangerous to persons other than the native title party. Mr Shandley states ‘any mining mob coming on the country needs to come and talk to the right Gooniyandi people before they go onto the country’. This is not only because the native title party must ‘look after the country for all those people who share the law and stories for this country, but also for the mining mob’s safety so they don’t disturb any dangerous sites’ (at 76).

[66] Based on the evidence provided by the native title party, I conclude the following are sites of particular significance to the native title party as contemplated by s 237(b):

- The three *Gunianbarrarra* (Kangaroo) Dreaming story sites:
    - *Walarri* (mud spring)
    - *Binduwa* (plain south of Mt Huxley); and
    - the areas of Quartz rock south of *Binduwa*
- A cave within *Gilulu,* an area of limestone within *Marrangany* (Sparke Range) and in the middle of the proposed licence containing burial remains
- Caves within *Damurrumurru,* or ‘pocket country’ within the proposed licence, containing human bones wrapped traditionally, as well as paintings and spring water

- A cave between *Yoowili* and Shady Bore on the southern side of Margaret River containing sacred and secret objects.

- *Gurninggyir,* a cave on the northern side of Margaret River containing burial remains and paintings

The other sites have not been sufficiently particularised or identified for me to draw conclusions about their particular significance.

[67] Both the grantee and Government party contend that the State's regulatory regime concerning Aboriginal heritage, mining and the environment is sufficient to ensure interference with sites is unlikely. Though the Tribunal is entitled to have regard and give considerable weight to the regulatory regime, it must consider the evidence presented in each case to decide whether the regime will be sufficient to make interference unlikely. Whilst there is no evidence to suggest the grantee will not comply with the AHA, I am not satisfied the AHA can provide sufficient protection given the nature of a number of the sites of particular significance. Notably, *Gilulu,* the cave site near *Yoowili,* and *Gurningyir*, are concealed sites which could be unknowingly interfered with by the grantee party (Shandley affidavit at 66, 70 and 72). The evidence indicates unauthorised or unaccompanied access to these sites of particular significance may amount to interference within the meaning of s 237(b). The evidence also indicates physical interference with the sites relating to the *Gunianbarrarra* (Kangaroo) dreaming story, even of a low impact nature, could result in the native title party losing the story. Furthermore, the native title party has a responsibility to maintain the story for other Aboriginal people, and tribal punishment could occur for such infractions (Shandley affidavit at 46, 50). I am persuaded the Kangaroo Dreaming story is of great significance to the native title party and the sites associated with it are of particular significance.

[68] The Government party has not offered any condition requiring the grantee party to enter into a Regional Standard Heritage Agreement (RSHA) with the native title party if requested ('RSHA condition'). The RSHA condition has often been offered by the Government party in other expedited procedure matters in the Kimberley region which have proceeded to an inquiry before the Tribunal (see for example *Warrwa #2 v 142 East Pty Ltd* (at [23])). Whilst the grantee party has indicated it is willing to enter into a RSHA with the native title party, there is no statutory declaration, affidavit or other evidence that a signed RSHA has been forwarded to the native title party, and no

RSHA condition binding the grantee party. I conclude in this matter that there is a real risk of interference to sites of particular significance to the native title party unless the full right to negotiate procedure contemplated under s 31 of the Act is followed.

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

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

[70] 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]).

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

[72] The native title party has not submitted any contentions or evidence regarding s 237(c) and similarly no contentions have been received from the grantee party. The Government party relies on its regulatory regimes with respect to mining, Aboriginal heritage and the environment to conclude that major disturbance will not occur.

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

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

Determination

[75] The determination of the Tribunal is that the grant of exploration licence E80/4746 to AC Minerals Pty Ltd is not an act attracting the expedited procedure.

Helen Shurven
Member
2 September 2014