NATIONAL NATIVE TITLE TRIBUNAL

Leedham Papertalk and Others on behalf of Mullewa Wadjari v Boadicea Resources Ltd and Another **[2014] NNTTA 90 (4 September 2014)**

Application No: **WO2014/0120**

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

- and -

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

Leedham Papertalk and Others on behalf of Mullewa Wadjari (WC1996/093) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Boadicea Resources Ltd (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 4 September 2014

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act likely to interfere directly with the carrying on of community or social activities – whether act likely to interfere with sites of particular significance – whether act likely to cause major disturbance to land or waters – expedited procedure attracted

Legislation: *Native Title Act 1993* (Cth), ss 29, 30(1), 31, 32(3), 151(2), 237
Aboriginal Heritage Act 1972 (WA)
Mining Act 1978 (WA)
Petroleum and Geothermal Energy Resources Act 1967 (WA)
Acts Interpretation Act 1901 (Cth), s 36(2)

Cases: *Banjo Wurrunmurra & Others on behalf of the Bunuba Native Title Claimants/Western Australia/Monte Ling, Kevin Peter Sibraa* [2007] NNTTA 21 (‘*Wurrunmurra v Ling*’)

Champion v Western Australia (2005) 190 FLR 362; [2005] NNTTA 1 (‘*Champion v Western Australia*’)

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

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

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

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

Leedham Papertalk & Ors on behalf of Mullewa Wadjari/Western Australia/Douglas Eric Kennedy, Leonard Geoffrey Haworth [2013] NNTTA 31 (‘*Papertalk v Kennedy*’)

Leedham Papertalk and Others on behalf of Mullewa Wadjari/Western Australia/State Resources Pty Ltd [2012] NNTTA 126 (‘*Papertalk v State Resources*’)

Leedham Papertalk and Others on behalf of Mullewa Wadjari/Western Australia/Top Iron Pty Ltd [2013] NNTTA 64 (‘*Papertalk v Top Iron*’)

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

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

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

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

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

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

Ward v Western Australia (1996) 69 FCR 208; [1996] FCA 1452 (‘*Ward v Western Australia*’)

Western Australia/Winnie McHenry on behalf of the Noongar People [1999] NNTTA 210 (‘*Western Australia v McHenry*’)

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

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

Representatives of the native title party	Ms Shirley Feng, Corser & Corser Lawyers Ms Lesleigh Bower, Corser & Corser Lawyers
Representatives of the Government party	Ms Sarah Power, State Solicitor's Office Ms Bethany Conway, Department of Mines and Petroleum
Representative of the grantee party	Mr Clarke Dudley, Boadicea Resources Ltd

REASONS FOR DETERMINATION

[1] On 18 October 2013, the Government party, through the Department of Mines and Petroleum ('DMP'), gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E70/4525 ('the proposed licence') to Boadicea Resources Ltd ('the grantee party'). The Government party included in the notice a statement that it considered the grant to be a future act that attracts the expedited procedure (that is, an act that can be done without the normal negotiations required by s 31 of the Act). In accordance with s 29(4)(a) of the Act, the notice specified the notification day as 23 October 2013.

[2] According to the notice, the proposed licence comprises 54 graticular blocks (approximately 151 square kilometres) located 87 kilometres north of Mullewa in the Shires of Murchison and Northampton. The notice states that the grant of an exploration licence authorises the applicant to explore for minerals for a term of five years from the date of the grant. The proposed licence is wholly situated within the registered native title claims of the Mullewa Wadjari Community (WC1996/093 – registered from 19 August 1996) and the Wajarri Yamatji (WC2004/010 – registered from 5 December 2005).

[3] An objection to the inclusion of the expedited procedure statement may be made to the National Native Title Tribunal ('the Tribunal') within four months of the notification day (see s 32(3) of the Act). Pursuant to s 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 notice advised that the three month closing date was 23 January 2014 and the four month closing date was 23 February 2013. By the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the four month closing date for lodgement became 24 February 2014, the next working day.

[4] On 21 February 2014, an objection application was lodged with the Tribunal by Leedham Papertalk and others on behalf of Mullewa Wadjari ('the native title party'). On 26 February 2014, I was appointed by President Raelene Webb QC to constitute the Tribunal for the purposes of conducting an inquiry into the application. An

objection application was also made on behalf of the Wajarri Yamatji claim, but was subsequently withdrawn.

[5] At a preliminary conference held on 11 March 2014, the grantee party indicated that it had considered the native title party's proposal to vary the Regional Standard Heritage Agreement ('RSHA') but wished to proceed to inquiry. Consequently, directions were issued for the conduct of the inquiry. These directions required each party to file a statement of contentions and supporting documentary evidence.

[6] DMP provided supporting documents on behalf of the Government party on 1 April 2014. On 1 May 2014, the native title party provided a statement of contentions dated 29 April 2014 and the affidavit of Mr Leedham Papertalk sworn 30 April 2014. The grantee party provided a statement of contentions on 10 June 2014 and the State Solicitor's Office provided the Government party's contentions on 2 July 2014. I note Mr Papertalk's affidavit refers to another mining company in the party list and at paragraph 4, but I take this to be a typographical error as the proposed licence identifier and all other aspects of the document refer to the current matter under inquiry.

[7] A listing hearing was scheduled for 24 July 2014 but was vacated with the consent of the parties, who agreed to proceed 'on the papers' (that is, without a hearing) in accordance with s 151(2) of the Act. I am satisfied it is appropriate to proceed in that manner.

[8] On 15 August 2014, the Tribunal provided parties with a copy of a map depicting the proposed licence and surrounding areas that was produced by the Tribunal's Geospatial Unit to assist with the determination of the objection. No party objected to the Tribunal using the map for this purpose.

Legal principles

[9] Section 237 of the Act provides:

> A future act is an ***act attracting the expedited procedure*** if:
>
> (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and

> (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and
>
> (c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

[10] In relation to the legal principles to be applied in this matter, I adopt those outlined by President Webb QC in *Yindjibarndi v FMG* at [15]-[21].

Evidence in relation to the proposed act

[11] The Government party provided the following documents in relation the proposed licence:

- A Tengraph plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity of the proposed licence.
- A report and plan from the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs pursuant to the *Aboriginal Heritage Act 1972* (WA) ('AHA') ('DAA Register').
- A copy of the proposed licence application.
- A draft Tenement Endorsements and Conditions Extract.
- A Tengraph quick appraisal detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features.

[12] The Tengraph quick appraisal indicates that the underlying land tenure is as follows:

- Four pastoral leases (Pinegrove, Bullardoo, Yallalong and Coolcalalaya) overlapping at 34.1, 14.7, 39.8 and 0.4 per cent respectively.
- One parcel of private land overlapping at 10.8 per cent.
- One Crown reserve (Emu Proof Fence) overlapping at 0.1 per cent.

- Six road reserves, each overlapping at less than 0.1 per cent.

[13] The area affected by the proposed licence is currently subject to two mining leases held by Hudson Resources Ltd (overlapping at 0.1 and less than 0.1 per cent respectively) and a special prospecting authority granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA).

[14] The area has previously been subject to:

- nine exploration licences granted between 1993 and 2012, overlapping at between 3.4 and 100 per cent, with an average lifespan of 1 and a half years; and

- 12 mineral claims granted between 1979 and 1983, overlapping at between 0.7 and less than 0.1 per cent, with an average lifespan of four years and five months.

[15] The quick appraisal also shows the services affected by the proposed licence are: two geodetic survey stations (SSM-Ajana 21 and 22); 18 tracks; one aircraft landing ground; one airfield runway; four fence lines; one tank with windmill; one windmill; one well/bore; four wells/bores with windmills; one earth dam; one named lake; nine named lakes (non-permanent); eight non-perennial lakes; 34 non-perennial minor watercourses; and one spring/soak/rockhole/waterhole.

[16] The report from the DAA Register establishes there are no registered sites or 'other heritage places' within the proposed licence area. There do not appear to be any Aboriginal communities within or in the vicinity of the proposed licence area.

[17] The draft Endorsement and Conditions Extract for the proposed licence indicates that the grant will be subject to the standard four conditions imposed on the grant of all exploration licences in Western Australia (see *Tullock v Western Australia* at [11]). The following additional condition will also be imposed on the proposed licence:

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

8. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Emu Proof Fence Reserve 36656 (Ajana).

9. No interference with Geodetic Survey Station Ajana 21 & 22 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

10. 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.

[18] The following endorsements (which differ from conditions in that the breach of an endorsement does not make the licensee liable to forfeiture of the licence) will also be imposed on the grant of the proposed licence:

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

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

3. 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 Proclaimed Surface Water and Irrigation District Areas the following endorsements apply:

4. 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.

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

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

6. 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.

7. 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:

8. 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:

9. 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.

Native title party contentions and evidence

Papertalk Affidavit

[19] The native title party relies on the affidavit of Mr Leedham Papertalk sworn 30 April 2014. Mr Papertalk deposes that he is a senior initiated man and applicant in the Mullewa Wadjari claim and has the right to speak on behalf of the Mullewa Wadjari claimants. I accept that Mr Papertalk has authority to speak for the native title party for the area of the proposed licence in this matter.

[20] Mr Papertalk's evidence in relation to the native title party's community and social activities (as per s 237(a) of the Act) is outlined in paragraphs 7 to 29 of his affidavit:

- The Mullewa Wadjari People regularly conduct four-day 'hunting weekends' within the proposed licence, as well as on the lands bounded by Geraldton, Nerrambyne, Pine Grove, Yuin Station and Yalgoo. Mr Papertalk is one of the leaders of the hunting weekends (at 7-8).

- Before the group commences hunting in the area, it is Mr Papertalk's practice to telephone the owner of Pine Grove Station to inform him of the group's intention to hunt within the proposed licence or notify him if the group intends to follow tracks or shortcuts through the area or the surrounding land while en route to another location (at 9-10).

- During hunting weekends, members of the community forage for food, hunt and gather bush tucker, trade, camp on the land, attend law ceremonies and teach their traditional laws and customs to their children (at 12).

- Hunting weekends occur almost on a weekly basis but do not always occur on the same days of the week, nor always include a Saturday or Sunday (at 13).

- Mr Papertalk estimates that around 90 per cent of Mullewa Wadjari people attend the hunting weekends, which may involve more than 100 people travelling on country in more than 20 four-wheel drive vehicles (at 14-15).

- The group encourages children and young adults from the community to attend the hunting weekends, as 'one of the important objectives of these weekends is to educate our young people about our traditional customs and traditions' (at 16).

- The Rabbit Proof Fence runs in an east-west direction across the lower third of the proposed licence, and the group sometimes follows the fence during hunting weekends. There are also a series of tracks that zigzag through the proposed licence, which the group utilises on hunting weekends or when members of the group travel over the area to another destination (at 17). I take this to be a reference to the emu proof fence referred to above at [12].

- It is also common for members of the group to travel across, camp and hunt within the proposed licence as individuals without the rest of the group (at 19).

- The types of animals hunted within the proposed licence include kangaroos, emus, wild turkeys, goannas, porcupines, blue tongue lizards and snakes. The group occasionally hunts non-native species such as goats or rabbits (at 20).

- Meat and other bush tucker collected during hunting weekends is brought back to the community and shared amongst its members. These items are relied on as a staple food source and are also used to trade for commodities such as petrol and diesel which are used by the community (at 21-23).

- The proposed licence is rich in bush tucker, including *gogola* (small, green pod shaped fruit), *jalga* (a bean-like vegetable) and the sap from *bimba* trees, which are especially prevalent in the proposed licence area (at 24).

- When bush tucker is in season, members of the claim group will visit the area on almost a weekly basis to gather bush tucker (at 26).

- During hunting weekends, adults within the group teach children traditional knowledge, including in relation to significant sites, the boundaries of culturally restricted areas, location of bush medicine, food and water, cooking techniques, use of tools and reading the sky (at 27).

- Mr Papertalk worries that, if the proposed licence is granted, the activities undertaken by the grantee party will: directly interfere with hunting, gathering, fishing, camping and teaching; disrupt the balance of wildlife and food sources in and around the proposed licence; and, if the land is damaged or the claim group prohibited from entering the area, force them to travel further out on country and possibly into other claim areas to hunt and gather food and resources (at 29).

[21] Mr Papertalk's evidence regarding significant areas or sites (as per s 237(b) of the Act) is outlined at paragraphs 30 to 33 of his affidavit:

- The claim group has a 'very strong cultural connection' to the 18 lakes and 34 minor watercourses within the proposed licence, as well as to Mummering Spring (at 30).

- The lakes and other watercourses are of particular significance because:

    - they contain freshwater, which attracts many types of wildlife, including kangaroos and emus, which makes hunting easier;

    - when the watercourses are flowing, the surrounding land is fertile and supports many animals and plants, which form a major source of food for the community;

    - the Mullewa Wadjari believe that, after death, the spirits of their ancestors and deceased stockmen travel into the lakes and watercourses before settling in the land itself;

    - according to the Mullewa Wadjari's dreamtime stories, a man-like spirit snake named the *Bimbara* resides in the watercourses and natural springs; and

- there are a number of camps on the banks of the watercourses within the proposed licence, especially around Lake Nerramyne (at 31).

- The *Bimbara* provides water, fills the land with plants and animals and encourages growth within flora and fauna. If the river or waterholes housing the *Bimbara* are disturbed, the descendants of these spirits will experience misfortunate, ill health and possibly death (at 31).

- The camps located on the watercourses often contain artefacts and tools used by the ancestors of the claimants. Although these sites are not registered, Mr Papertalk says they are significant to him and the Mullewa Wadjari community (at 31).

- Mr Papertalk is worried that the waste from exploration and mining activities will flow into the watercourses and disturb the spirits of their ancestors and the *Bimbara* (at 32).

[22] Mr Papertalk's evidence on the issue of major disturbance (as per s 237(c) of the Act) is outlined at paragraphs 34 to 37 of his affidavit:

- As a senior initiated Mullewa Wadjari man, it is Mr Papertalk's duty to protect the land within the proposed licencee (at 34).

- If Mr Papertalk fails to fulfil this duty, he believes there will be terrible consequences for members of the community, including sickness and death (at 35).

- Since the native title party has not undertaken a heritage survey of the area, Mr Papertalk believes there are sites which are significant to the group but have not been recorded on the DAA Register (at 36).

- Mr Papertalk believes, if the proposed licence is granted, the grantee party should: enter into a mutually acceptable heritage agreement with the Mullewa Wadjari people; commit to properly consulting with them prior to undertaking any ground-disturbing work within the proposed licence; and negotiate with the Mullewa Wadjari people about the proposed licence (at 37).

Native title party statement of contentions

[23] The native title party's statement of contentions for the most part repeats the statements made in Mr Papertalk's affidavit. However, the following additional points are also made:

- The fact that the DAA Register does not record any sites does not mean that sites do not exist on the proposed licence (at 23).

- The nature of some sites within the proposed licence area are such that even non-ground disturbing work may cause interference with sites to a level that is distressing to the native title party, and culturally inappropriate to a degree that would constitute interference for the purposes of s 237(b) of the Act (at 31).

- Despite the protections afforded by the AHA, damage suspected to be the result of mining activities has already materialised at the Tallering Peak site, a registered Aboriginal site which also falls within the native title party's claim area. The native title party believes that the damage to the site resulted in the death of several members of the native title party as a consequence of the native title party's failure to fulfil its duty to protect the site. The native title party regards this as 'direct regional evidence of the negative impacts of mining activities upon the Native Title Party, which are likely to occur when the Native Title Party is precluded from engaging in proper consultation with tenement holders.' The native title party submits that 'the probability of the risk materialising is increased in the present case as the location of the significant sites within the Tenement area are not marked out on the Register of Aboriginal Sites' (at 32).

- Sites within the proposed licence cannot be adequately protected by the AHA because their locations are unknown to the grantee party. The native title party submits that the only way to avoid the risk of interference is through negotiation and cooperation between the native title party and the grantee party (at 33).

- In determining whether the grant of the proposed licence is likely to involve major disturbance, the Tribunal should give particular consideration to the:

- significance of watercourses in the proposed licence area;
- frequent use of the proposed licence and surrounding areas for travel and hunting and gathering of bush tucker by the community;
- use of the proposed licence for the education of younger members of the community; and
- existence of unregistered sites in the proposed licence that are unknown to the grantee party (at 34).

Grantee party contentions and evidence

[24] The grantee party's statement of contentions was provided in the form of a signed statement made by its managing director, Mr Clarke Dudley.

[25] Mr Dudley states that, having read the native title party's statement of contentions, he is aware that the native title party has valid concerns regarding the protection of heritage sites and respect for cultural issues within the proposed licence. Mr Dudley states he believes there may potentially be sites of heritage significance within the proposed licence which would require assessment, particularly if ground-disturbing exploration activities were carried out. Mr Dudley says he is aware of the operation of the AHA and the obligation not to disturb heritage sites, registered or otherwise. Mr Dudley states he understands any planned works must not adversely impact on heritage sites and must be formulated with respect for local Aboriginal cultural issues, and wishes to engender good relationships with the local Aboriginal communities. Mr Dudley states that he has offered to enter into a 'RSHA-styled agreement', which he believes is an appropriate heritage agreement, and is willing to undertake heritage surveys of areas where ground activities are planned. I do note no actual evidence of that offer to enter into a heritage agreement has been provided, however, Mr Dudley has signed a statement to the effect he has made such an offer, and the native title party has not disputed that.

[26] Mr Dudley states that the planned exploration in the first year after grant will be divided between office work and field work involving geochemical sampling. The program for the second year will be formulated based on the results of the first year

program, and could include geophysical surveys and exploratory drilling, in which case a heritage survey and site clearance would be required. Mr Dudley says there are a number of existing roads and tracks in the area, so it is unlikely new access ways will need to be constructed, which will minimise the environmental impact and post-drilling rehabilitation. Mr Dudley states that rehabilitation will be carried out as required under the *Mining Act* and regulations.

Considering the Evidence in context of s 237 of the Act

Community or social activities (s 237(a))

[27] The Tribunal is required under s 237(a) to make a predictive assessment of whether there is a real risk or chance that the grant of the proposed licence will directly interfere with the community or social activities of the native title party. The notion of direct interference involves an evaluative judgment of whether the proposed licence is likely to be the proximate cause of the interference, which must be substantial and not trivial in its impact on community or social activities (see *Smith v Western Australia* at [23]). The assessment is also contextual, taking into account factors such as mining or pastoral activity that may have already affected the native title party's community or social activities (see *Smith v Western Australia* at [27]).

[28] The native title party's submissions on interference with community or social activities are focused on the hunting weekends said to be carried on by members of the claim group in the proposed licence and elsewhere within the claim area.

[29] The Government party notes that seemingly identical evidence and contentions have been provided by the Tribunal in at least three other inquiries, each of which had dealt with areas some distance from one another and the proposed licence (see *Papertalk v Stokes*; *Papertalk v Top Iron*; *Papertalk v Kennedy*). On this basis, the Government party says that caution should be exercised in considering the native title party's evidence and contentions and the Tribunal should place less weight on the material than may ordinarily be expected, as it is not unique to the tenement area or specific to the inquiry. The Government party contends that, on the best construction available to the native title party, the evidence suggests the activities identified are undertaken in an area much larger than the tenement area (at 14-15).

[30] The Government party contends that hunting and mineral exploration are, by their nature, inherently capable of coexistence and the evidence suggests that activities associated with the hunting weekends are compatible with similar interests, as the area has previously been subject to exploration, pastoral, mining and other activities. On this basis, the Government party submits that it is reasonable to infer that the proposed licence will not have a direct impact on the identified community and social activities (at 44-46). The Government party argues that, given the native title party has previously asserted that activities of this kind are carried on in other areas, any effect that the proposed licence is likely to have must be seen in that context (at 47).

[31] In response to the concern expressed by Mr Papertalk regarding access to the area, the Government party notes that the proposed licence will not confer on the grantee party a right at large to prevent access to the area, and the slight risk that a member of the native title party might be physically obstructed in relation to the area of land where the grantee party is operating on a given day is not substantial enough to constitute interference for the purposes of s 237(a). The Government party argues that, in light of the distance of the proposed licence area from the external boundaries of the claim, it does not follow that the grant would cause members of the community to travel beyond the claim area to carry on their community and social activities (at 49).

[32] As noted above at [27], the evaluation of the likelihood of direct interference with community or social activities is a contextual exercise. In performing that exercise, the Tribunal is entitled to have regard to the previous and contemporary use of the land or waters and its effect on the activities identified by the native title party (see *Tullock v Western Australia* at [122]). The Tribunal's decision in *Champion v Western Australia* illustrates this point. In that matter, the Tribunal observed (at [64]) that, despite a long history of mining and pastoral activity in the area, there was no evidence these activities had had a detrimental effect on the native title party's community and social activities.

[33] Similarly, the Tribunal is entitled to take into account the extent to which the identified community and social activities may be carried on over a wider area. In *Boddington v Bacome,* Deputy President Sosso found (at [44]) that evidence presented by the native title party over four inquiries indicated that the community and social activities were 'carried out over very wide geographic area' (of which the act in

question only comprised ‘a small fragment’). As the evidence did not establish that the land and waters concerned had greater importance for the activities than the surrounding country, Deputy President Sosso was not satisfied they were likely to be directly interfered with by the grant of the future act. In subsequent cases, the Tribunal has taken into account the size of the act relative to the claim area in determining the likelihood of direct interference with community and social activities (see for example *Cheinmora v Heron Resources* at [31]; *Wurrunmurra v Ling* at [21]).

[34] In the present case, there is evidence the land and waters have periodically been subject to mining and exploration interests over the last 35 years, the most recent of which was the grant of an exploration licence in 2012, which was surrendered the following year. As Member McNamara observed in *Western Desert v Teck Australia* (at [123]), it does not necessarily follow from the grant of a mining tenement that exploration or mining has actually taken place. Nevertheless, it is reasonable to infer that the rights conferred on the holders of these tenements were exercised to some degree, if not to their full extent. There is no evidence that the exercise of these rights have had any effect on the community and social activities identified by the native title party. The Government party also refers to the special prospecting authority that covers the area, but it is not clear what activities are authorised by the grant.

[35] The Government party has drawn attention to what is perhaps a more serious question regarding the weight that can be given to the native title party’s evidence in circumstances where similar, if not identical, evidence or contentions have been presented in previous inquiries. It is not necessary for me to draw any adverse conclusions from this, as it is conceivable that the participants in the hunting weekends might travel to different parts of the claim area on each occasion. However, it does illustrate that these activities are not isolated to the proposed licence, but in fact relate to a much larger area. This also places Mr Papertalk’s evidence regarding the scale and frequency of the hunting weekends in a broader context, as given these activities are undertaken over a number of different areas, it is less likely that members of the Mullewa Wadjari community will encounter the grantee party during its exploration program on the proposed licence.

[36] Mr Papertalk also states his belief that the activities to be undertaken by the grantee party will directly interfere with the balance of wildlife and food sources in and

around the proposed licence area. He argues this will directly interfere with or prevent the ability of members of the Mullewa Wadjari community to hunt, forage and fish in the area. However, no evidence is provided to support this belief, and in this respect I consider Mr Papertalk's concerns to be unsubstantiated. In particular, there is no evidence that activities similar to those proposed by the grantee party have had any effect on the number or distribution of fauna and flora in the claim area, despite other instances of exploration. As I previously noted in *Papertalk v State Resources* (at [41]), the grantee party's activities are unlikely to have any greater effect in this respect than the native title party's use of the area for hunting weekends, which are said to involve more than 100 people travelling in approximately 20 four-wheel drive vehicles.

[37] In the circumstances, taking into account the evidence before me and the matters previously considered by the Tribunal, I find that the proposed licence is unlikely to directly interfere with the carrying on of the native title party's community and social activities.

Sites of particular significance (s 237(b))

[38] The issue the Tribunal is required to determine in relation to s 237(b) of the Act is whether there is likely to be (in the sense of a real chance or risk of) interference with areas or sites of particular (that is, special or more than ordinary) significance to the native title party in accordance with its traditions. As noted above at [16], here are no registered sites or 'other heritage places' in the proposed licence area. However, the DAA Register does not purport to be a record of all Aboriginal sites in Western Australia, and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters.

[39] The native title party's evidence in relation to s 237(b) concerns the significance of lakes and other watercourses located in the proposed licence area, as well as camp sites said to be situated on the banks of these watercourses.

[40] The Government party contends that the native title party's evidence does not specify any watercourses or camp sites as being of 'particular significance' in accordance

with the traditions of the native title holders (at 61-62). The Government party submits that 'an area or site of particular significance' must mean a place which stands out in some way from the general background of other sites and the country as a whole. The Government party does not accept there is sufficient evidence to demonstrate that the watercourses or camp sites are sites of this kind, or that the AHA will be insufficient to prevent interference (at 65-66).

[41] The identification of areas or sites of particular significance is a precondition to the inquiry under s 237(b) (see *Yindjibarndi v FMG Pilbara* (at [125]). As information about areas or sites of this kind is peculiarly within the knowledge of the relevant native title holders, any failure on the part of the native title party to produce evidence about their existence may lead the Tribunal to draw an unfavourable inference in the application of its common sense approach to the evidence (see *Ward v Western Australia* at 567). In previous matters, the Tribunal has held that, where a native title party asserts that an area or site is one of particular significance, the area or site must be identified and the nature of its significance explained (see *Western Australia v McHenry*; *Silver v Northern Territory* at [91]).

[42] The evidence of the native title party outlines, in general terms, the significance of lakes and watercourses in the proposed licence and their connection with the *Bimbara* dreaming story and the spirits of the claim group's ancestors. The Tribunal has heard evidence and contentions to this effect in previous matters (see for example *Papertalk v Stokes* at [23], [36]; *Papertalk v Top Iron* at [31], [46], [54]). In the present matter, the native title party relies on the affidavit of Mr Papertalk, though it does not add a great deal to the information provided to the Tribunal in previous inquiries.

[43] I accept that lakes and other watercourses are generally significant to the Mullewa Wadjari community. However, the evidence of Mr Papertalk does not identify any specific features within the proposed licence that might fit the description of an area or site of particular significance. The only features that are specifically identified in Mr Papertalk's affidavit are Mummering Spring and Lake Nerramyne, but there is no evidence as to how these sites stand out from other bodies of water in the proposed licence, and the claim area generally.

[44] Mr Papertalk also deposes to the existence of camp sites located on the banks of the watercourses located in the proposed licence area, especially around Lake Nerramyne. None of these camp sites are identified, and little information is provided about the significance of these sites other than Mr Papertalk's statement that the camp sites often contain artefacts and tools used by Mullewa Wadjari ancestors. While I understand these areas are important to the Mullewa Wadjari, given the paucity of evidence about the camp sites, I am not satisfied that any of them are areas or sites of particular significance within the meaning of s 237(b).

[45] As the evidence does not establish the existence of areas or sites of particular significance in the proposed licence or surrounding areas, I am not in a position to consider whether the grant is likely to interfere with areas or sites of this kind. Nonetheless, to the extent the evidence suggests the possible existence of sites which are significant to the native title party, I am satisfied the grantee party is willing to enter into a heritage agreement with the native title party and intends to undertake heritage surveys prior to commencing ground-disturbing activities. This should ensure that any significant areas or sites are identified and appropriate steps taken to avoid interference.

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

[47] Taking these matters into account, I find that the proposed licence is not likely to interfere with areas or sites of particular significance in accordance with the traditions of the native title party.

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

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

[49] The native title party contends that the Tribunal should have regard to: the significance of watercourses located in the proposed licence; the frequent use of the proposed licence and the surrounding areas for travel and hunting and gathering by members of the Mullewa Wadjari community; the use of the area for the education of younger members of the community; and the existence of unregistered sites that are unknown to the grantee party. Mr Papertalk states that it is 'my duty to protect the land within the tenement area' and, if he fails to fulfil this duty, 'there will be terrible consequences for members of the Mullewa Wadjari community, including sickness and even death' (at 34-35). Mr Papertalk also states his belief that, since the native title party has not undertaken a heritage survey over the proposed licence area, it is likely to contain sites of significance to the native title party that are not recorded on the DAA Register (at 36).

[50] The Government party contends (at 82) that the grant of the proposed licence is not likely to involve major disturbance relevant to s 237(c) of the Act because:

- the grantee party has stated that most of its activities will be low-impact and non-intrusive, and any ground disturbing activities are intended to be conducted in a way that will not adversely impact on heritage sites and will respect local Aboriginal cultural concerns;

- the exercise of rights conferred by the proposed licence will be regulated by the State's regulatory regimes with respect to mining, Aboriginal heritage and

the environment. The Government party submits that it is likely these regimes will together and separately avoid any major disturbance to land and waters;

- any authorised disturbance to land and waters caused by the grantee party may be mitigated pursuant to proposed conditions requiring rehabilitation of the land following completion of exploration;

- the area of the proposed licence has been subject to prior mineral exploration and possibly mining activity, and it is also largely covered by pastoral leases and entirely covered by a special prospecting authority. The Government party submits that the activities contemplated by the grantee party would be the same as, or no more significant than, the previous and continuing use of the area; and

- it does not appear the proposed licence area has any particular characteristics that would likely result in major disturbance to land and waters given the activities proposed by the grantee party.

[51] Mr Papertalk expresses concerns about the contamination of watercourses as a result of waste from exploration and mining activities, and the effect this would have on the *Bimbara* and the spirits of the claim group's ancestors (at 32). I accept that, if this were to occur, it might be considered major disturbance from the perspective of the local Aboriginal community and perhaps from the point of view of the community in general. However, I am satisfied that the risk of contamination is no greater than the previous use of the land and waters, and regulations will operate to further reduce that risk. In particular, I note the effect of the proposed endorsements, which draw the grantee party's attention to environmental protection and water management legislation and specifically address the 'storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances.' I have also had regard to the fact that the proposed licence does not authorise the use of mechanised equipment unless approved by the DMP's Environmental Officer.

[52] In relation to the use of the area by members of the Mullewa Wadjari community for various purposes, I have already concluded that the grantee party activities on the proposed licence is unlikely to directly interfere with the community and social activities of the native title party. To the extent the native title party's contentions rely

on assertions about the existence of unspecified sites, I am unable to conclude on this basis that the proposed licence is likely to involve major disturbance for the purposes of s 237(c). In any case, I am satisfied the grantee party will take steps to identify and avoid disturbance to any sites of significance to the native title party.

[53] Mr Papertalk also refers to his duty to protect the land within the proposed licence area and the possible consequences of failing to perform the duty. As Mr Papertalk does not provide any information about the content of this duty or how the grant of the proposed licence might affect the performance of the duty, his evidence on this issue has not assisted me to determine the likelihood of major disturbance.

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

- The proposed licence area is almost entirely subject to pastoral leasehold, road reserve or private interests. It is likely that disturbance has already occurred in these areas.

- The proposed licence will be subject to conditions requiring the grantee party to rehabilitate all disturbances to the surface of the land made as a result of exploration and the removal of all waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings at the end of the exploration program.

- There is no evidence the grantee party is likely to fail to comply with the relevant regulatory regimes**.**

[55] Taking all of these considerations into account, I find that the proposed licence is not likely to involve major disturbance to the land and waters concerned.

Determination

[56] The determination of the Tribunal is that the act, namely the grant of exploration licence E70/4525 to Boadicea Resources Ltd, is an act attracting the expedited procedure.

Helen Shurven
Member
4 September 2014