NATIONAL NATIVE TITLE TRIBUNAL

***Annie Milgin and Others on behalf of Nyikina Malgana v Dempsey Minerals Ltd and Another,* [2015] NNTTA 19 (18 May 2015)**

Application No: **WO2013/1197**

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

- and -

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

Annie Milgin and Others on behalf of Nyikina Malgana (WC1999/025) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Dempsey Minerals Ltd (grantee party)

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

Tribunal: Ms H Shurven, Member
Place: Perth
Date: 18 May 2015

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 not attracted

Legislation: *Native Title Act 1993* (Cth), ss 29, 30(1), 31, 32(3), 77, 151(2), 237
Aboriginal Heritage Act 1972 (WA)
Mining Act 1978 (WA), s 66
Environmental Protection Act 1986 (WA)
Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Cases:	*Ben Ward; Clarrie Smith and Ors v Western Australia; Australian United Gold Nl; CRA Exploration Pty Ltd; BHP Exploration Pty Ltd; Asian Mining Nl and Sorna Pty Ltd* [1996] FCA 1452, (‘*Ward & Smith v Western Australia*’)
	Doris Ryder and Others on behalf of Lamboo People/Western Australia/Allan Neville Brosnan and Phyllis Marie Brosnan [2010] NNTTA 15 (*‘Ryder v Brosnan’*)
	Kevin Peter Walley on behalf of the Ngoonooru Wadjari People/Western Australia/Allan Brosnan [2001] NNTTA 78, (‘*Walley v Brosnan*’)
	Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd [2011] NNTTA 22, (‘*Tullock v Bushwin*’)
	Little and Others v Oriole Resources Pty Lt [2005] FCA 506, (‘*Little v Oriole Resources*’)
	Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) RNTBC and Others v FMG Pilbara Pty Ltd and Another [2015] NNTTA 4, (‘*Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara*’)
	Silver and Others v Northern Territory of Australia and Others (2002) 169 FLR 1; [2002] NNTTA 18, (‘*Silver v Northern Territory*’)
	Smith v Western Australia and Another (2001) 108 FCR 442; [2001] FCA 19, (‘*Smith v Western Australia*’)
	Watson on behalf of the Nyikina Mangala People v State of Western Australia (No 6) (includes Corrigendum dated 1 July 2014) [2014] FCA 545, (‘*Watson v Western Australia*’)
	Western Australia/Glen Griffin Venn Money/Jack Britten & Ors [2001] NNTTA 53, (‘*Money v Britten’*)
	Wilma Freddie & Others on behalf of the Wiluna Native Title Claimants/Western Australia/Kingx Pty Ltd [2011] NNTTA 170, (‘*Freddie v Kingx*’)
	Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd & Another [2014] NNTTA 8, (‘*Yindjibarndi Aboriginal Corporation v FMG Pilbara*’)
Representative of the native title party:	Ms Angela Booth, Kimberly Land Council
Representatives of the Government party:	Ms Carol Walls, State Solicitor’s Office Ms Penny Lazos, Department of Mines and Petroleum
Representative of the grantee party:	Ms Stephanie Lee, McMahon Mining Title Services Pty Ltd

REASONS FOR DETERMINATION

[1] The Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act', 'NTA') of its intention to grant exploration licence E04/2335 ('the proposed licence') to Dempsey Minerals Ltd ('the grantee party'). The notice included a statement that the Government party considers the grant attracts the expedited procedure (that is, that the proposed licence is an act that can be done without the negotiations required by s 31 of the Act). The 'notification day' is specified in the notice as 23 October 2013 (see s 29(4)(a) of the Act).

[2] The s 29 notice describes the proposed licence as comprising 50 graticular blocks (approximately 163 square kilometres), located 49 kilometres south of Derby, in the shire of Derby-West Kimberley.

[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) of the Act, the objection may be made by:

(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] At the date of notification, the proposed licence was overlapped 98.82 per cent by the Nyikina Mangala native title claim (WC1999/025 – registered from 28 September 1999). On 20 November 2013, the persons comprising the applicant in the Nyikina Mangala claim lodged an application with the Tribunal objecting to the assertion of the expedited procedure in respect of proposed licence. A determination of native title was subsequently made in the Nyikina Mangala claim by Gilmour J in the Federal Court on 29 May 2014 (see *Watson v Western Australia*) and, as a result of that determination, the rights and interests of the native title holders are now held in trust by the Walalakoo

Aboriginal Corporation RNTBC ('the native title party'). The determined outcomes in relation to the existence of native title rights and interests over the area covered by the proposed licence are as follows:

- Exclusive native title rights and interests exist – 0.06 per cent of the proposed licence;
- Non-exclusive native title rights and interests exist – 98.02 per cent of the proposed licence; and
- Native title does not exist – 0.74 per cent of the proposed licence.

Background

[5] On 24 October 2013, I was appointed to be the Member for the purposes of determining an inquiry, should such be required.

[6] At the preliminary conference held on 11 March 2014, the grantee party indicated they wished to review the native title party's preferred agreement. Consequently, the matter was adjourned to allow negotiations to occur.

[7] At a status conference on 16 July 2014, the grantee party representative advised that no further instructions had been received from the grantee party, therefore, the matter was programmed for inquiry. On 17 July 2014, I set directions for the inquiry.

[8] In compliance with the directions, parties provided the following submissions and evidence: the Government party's initial evidence on 30 July 2014 through the Department of Mines and Petroleum ('DMP'); the native title party's contentions on 27 August 2014 ('NTP Contentions') accompanied by the affidavit of Ms Rona Charles affirmed 30 July 2014 ('Charles Affidavit') and Ms Barbra Friedewald affirmed 25 August 2014 ('Friedewald Affidavit'); the grantee party's contentions and evidence on 10 September 2014 ('GP Contentions'); the Government party's contentions (through the State Solicitor's Office) on 24 September 2014 ('GVP Contentions'); and the native title party's contentions in reply ('NTP Reply') on 6 October 2014.

[9] On 9 October 2014, the Tribunal sought parties' views as to whether the matter could be determined 'on the papers' pursuant to s 151(2) of the Act and no objections to that

course of action were received. I have considered the matter and I believe it can be adequately determined 'on the papers' in accordance with s 151(2) of the Act.

Legal principles

[10] 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.

[11] In relation to the legal principles to be applied in this matter, I adopt those outlined by President Raelene Webb QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (at [15]-[21]), which have been recently endorsed by the Federal Court in the decision of *FMG Pilbara v Yindjibarndi Aboriginal Corporation*.

Evidence in relation to the proposed act

[12] The Government party provided: a statement of contentions; 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 Department of Aboriginal Affairs' (DAA) Sites Register; a copy of the tenement application; a copy of the proposed endorsements and conditions of grant; the instrument of licence; and Tengraph quick appraisal documents.

[13] The Tengraph quick appraisal establishes the underlying land tenure of the proposed licence to be:

- Pastoral Lease H649773 (Yeeda) at 86.2 per cent;
- Pastoral Lease 3114/1194 (Yakka Munga) at less than 0.1 per cent;

- Five parcels of crown reserve totalling 11 per cent;
- Three parcels of vacant crown land totalling 1.5 per cent; and
- Three parcels of road reserve totalling approximately 0.1 per cent.

[14] The proposed licence is also affected by the following features:

- Petroleum Exploration Permits EP428 and EP487 totalling 100 per cent;
- National Heritage List NHL/106063 (The Kimberley) at 16.5 per cent;
- Ground Water Area GWA/10 (Canning-Kimberley) at 100 per cent; and
- Surface Water Area SWA/15 (Fitzroy River and Tributaries) at 41.2 per cent.

[15] 16.4 per cent of the proposed licence is under quarantine by the Department of Agriculture and Food (marked out as File Notation Area 320) and access to this area is subject to the grantee party obtaining a permit from the Agriculture Protection Board (see endorsement 3 at [21] of this decision).

[16] The proposed licence is subject to four live tenements, being two general purpose leases, both overlapping the proposed licence at less than 0.1 per cent; and, three mining leases, overlapping the proposed licence variously at 0.1, 0.2 and 0.5 per cent.

[17] The proposed licence has also previously been subject to:

- Seven forfeited or surrendered exploration licences in operation between 1987 and 2013, and overlapping the proposed licence between 100 and 9.4 per cent;
- Three forfeited mining leases in operation between 1982 and 1991, and overlapping the proposed licence between 0.2 and less than 0.1 per cent;
- Two expired prospecting licences in operation between 1985 and 1987, and overlapping the proposed licence between 0.2 and 0.1 per cent;
- One forfeited general purpose lease in operation between 1983 and 1984, and overlapping the proposed licence at 0.2 per cent; and
- A large number of cancelled and expired mineral claims in operation between 1976 and 1984, and overlapping the proposed licence between 0.7 and less than 0.1 per cent.

[18] The report from the DAA Database shows there is one registered Aboriginal site located on the proposed licence, namely the Fitzroy River and recorded as a mythological site with no file, boundary or gender restrictions. Tribunal mapping shows this is part of the larger Fitzroy River geological feature. There are no Other Heritage Places recorded within the proposed licence.

[19] There does not appear to be any Aboriginal communities within the proposed licence, however, Tribunal mapping shows Pandanus Park community to be located approximately 8km east of the proposed licence.

[20] The Draft Tenement Endorsement and Conditions Extract indicates the proposed licence will be subject to the standard four conditions (1-4) imposed on the grant of all exploration and prospecting licences in Western Australia (see *Tullock v Bushwin* [11]-[12]), and a further five conditions (5-9). These nine conditions are as follows:

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. No interference with Geodetic Survey Station SSM-DERBY 30, 31 and SSM-R 113 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

8. No excavation, excepting shafts, approaching closer to the Great Northern Highway, Highway verge or the road reserve than a distance equal to twice the depth of the excavation and mining on the Great Northern Highway or Highway verge being confined to below a depth of 30 metres from the natural surface, and on any other road or road verge, to below a depth of 15 metres from the natural surface.

9. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Sand Reserve 47653, Stock Route Fitzroy Crossing to Nobbys Well Reserve 23226, Watering Place Reserve 23227, Resting Place for Travellers and Stock Reserve 23227 and Foreshore Seabed and Navigable Waters.

[21] The following draft endorsements (which differ from conditions in that the licensee will not be liable to forfeit 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.

3. The land the subject of this Licence affects an area under quarantine for Noogoora Burr (under the provisions of the Agriculture and Related Resources Protection Act 1976) delineated in red and shown as File Notation Area 320 in TENGRAPH. Access to the quarantine area is subject to the Licensee obtaining an entry point from the Kununurra Regional Office of the Agriculture Protection Board of Western Australia.

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

4. 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

5. 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.

6. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances 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:

7. 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:

8. 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:

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

10. All activities to be undertaken with a minimum disturbance to riparian vegetation.

11. 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.

12. 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:

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

[22] Further Government party contentions will be outlined as relevant under the consideration of the elements of s 237 of the Act.

Native title party contentions and evidence

[23] The native title party contends that the grant of the proposed licence is an act that is likely to interfere directly with the carrying on of the native title party's community or social activities (s 237 (a)) and interfere with areas or sites of significance to the native title party (s 237 (b)). The native title party does not make any specific contentions on the issue of whether the proposed licence is likely to involve major disturbance to the land and waters concerned (s 237(c)).

[24] In support of these contentions, the native title party relies on the affidavits of Ms Charles and Ms Friedewald.

[25] Ms Charles states that she: is a Nyikina and Warrawa woman; is a Director of the Walalakoo Aboriginal Corporation; has authority to speak about land matters; and that at a Walalakoo Cultural Advisor meeting she was identified as the person to give evidence for this matter (Charles Affidavit at 6). I accept that Ms Charles is authorised to speak on behalf of the native title party in this matter.

[26] Ms Charles resides at *Yurmulan* Pandanus Park community, which she says is about 'half an hours drive from Langey Crossing' (Charles Affidavit, paragraph 9). Tribunal

mapping indicates Langey Crossing is on the proposed licence, and Pandanus Community is approximately 12 kilometres South East of Langey Crossing. Ms Charles states that 'approximately 150 people reside in my community and access the tenement area regularly' (Charles Affidavit, paragraph 10). She also states that the proposed licence area is regularly visited by people from Lower Liveringa and Mount Anderson, which Tribunal mapping indicates are approximately 30 kilometres and 50 kilometres respectively south east of the proposed licence area.

[27] Ms Charles states that the area 'is a great hunting ground for my community and has significant stories'. She states Langey Crossing (*Langi Langi*) is so significant to the native title party's cultural identity that it was selected as the location for the native title party determination on country hearing (Charles Affidavit, paragraph 8). I note that the hearing was held at Langey Crossing, which is in the northern portion of the proposed licence, very near the Fitzroy River.

[28] Ms Friedewald is a lawyer engaged by the Kimberley Land Council ('KLC'). Ms Friedewald deposes that the KLC has no record of receiving any feedback from the grantee party on the heritage protection agreement offered by the native title party (Friedewald Affidavit, paragraph 2). Ms Friedewald deposes that the grantee party has at no time entered into dialogue or correspondence with the KLC with a view to establishing a heritage protection regime, and states there is nothing she is aware of to suggest that such dialogue or correspondence would transpire after grant (Friedewald Affidavit, paragraph 3). The native title party also submits in their contentions that the grantee party has not consulted with the native title party, nor provided any information at any time which might go to explain how it intends to consult, should the grant be made. However, the application of the expedited procedure is not concerned with obtaining agreement of the native title party. Rather, as President Webb QC noted in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (at [72])), 'the question is, should the right to negotiate apply because of the likely effect the exploration activities will have...'

[29] In addition, in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara*, Member McNamara noted (at [101]):

> The conduct of the grantee party in negotiations 'conducted in the shadow of objection proceedings' may well be relevant to the predictive assessment required under s 237 of

> the Act (see *Cherel v Faustus Nominees* at [32]). However, though it appears the grantee party did not respond to the proposed land access agreement, I am not prepared to draw any adverse inferences from this fact. The grantee party's conduct may have simply amounted to a rejection of the proposed agreement, especially in the context of the subsequent offer of the RSHA. As the Tribunal noted in *Velickovic v Westex Resources* at [19], the question of whether an agreement was accepted or rejected by the grantee party in the course of any discussions subsequent to the lodgement of an objection is irrelevant to the task the Tribunal must undertake, and it is not the Tribunal's role to endorse one agreement over another (see *Champion v Western Australia* at [46]).

[30] Ms Friedewald also states that the grantee party has not provided the native title party with any detail about its proposed or planned exploration activities (Friedewald Affidavit, paragraph 4). The level of detail of the grantee party activities is the subject of further comment later in this decision (see for example at [57] and [68]).

[31] Finally, the native title party reply requests that (emphasis added) 'the NNTT *only* consider contentions from the grantee and the State which are backed up by affidavit or other evidence. A decision by the NNTT that the 'expedited procedure' apply to the tenement grant is a serious action with serious connotations for the native title party' (at 9).

[32] The legal position in relation to evidence in such matters, as explained by Carr J in *Ward & Smith v Western Australia* is (at 26):

> The "common sense approach to evidence" is not the same as applying an evidential onus of proof. In administrative matters such as these, any party (not just the native title party) has what might be termed an evidentiary choice. They might choose not to lead any evidence on a particular issue. But that does not necessarily mean that they must fail on that issue i.e. that they have an evidential onus of proof. The Tribunal might (subject to observing the requirements of procedural fairness) make its own inquiries and satisfy itself that the particular issue should be decided in favour of the party electing not to put evidence before it. Alternatively, part of an opposing party's evidence whether in cross-examination or otherwise, may satisfy the Tribunal on the point. That party has, in colloquial terms, taken its chances and won. However...where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn when the administrative tribunal applies its common sense approach to evidence. Again, if this happens, it will not be because of the application of any evidential onus of proof, but by the application of the common sense approach to evidence.

[33] The Tribunal also outlined and adopted relevant principles in relation to evidentiary matters and the consideration or weight to give materials provided to the Tribunal in *Ryder v Brosnan* (at [19]), being:

> - Section 109 of the Act is relevant to this issue in that the Tribunal must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way (s 109(1)) and that in carrying out its functions is not bound by technicalities, legal forms or rules of evidence (s 109(3)).

- Although given a wide degree of latitude in carrying out its statutory functions by not being bound by the rules of evidence, this does not mean that the Tribunal will invariably disregard them.

- Whether complying with the rules of evidence or not the information before the Tribunal must be logically probative and relevant to the issues before it.

- While exempted from adherence to the rules of evidence the Tribunal is bound by the rules of natural justice (or procedural fairness) and must give all parties an opportunity to be heard.

- Contentions by representatives of a party do not constitute primary evidence. In expedited procedure inquiries (as in native title proceedings generally) the best evidence provided on behalf of native title party interests generally comes from the native title holders themselves.

- The Act provides that the right to negotiate inquiries may be determined on the papers if appropriate (s 151(2)) and virtually all expedited procedure objection inquiries are now conducted in this way, making the documentary evidence provided critical to a determination

[34] That decision went on to outline (at [26]):

> ...the Tribunal has also accepted the signed contentions of grantee parties as evidence. In considering whether documentary evidence of this kind is admissible and the weight to be given to it the Tribunal will have regard, among other things, to how significant the evidence is in the context of the particular matter and whether or not it is contested by the other parties. In a case where the evidence is critical to a decision and in dispute it is important for parties to provide the best evidence available which in the case of matters conducted on the papers will usually be an affidavit or statutory declaration.

[35] Applying those principles to the present matter, the grantee party have provided a statement signed by their representative, portions of which have been contested by the native title party, and the native title party have provided affidavit evidence to support their contentions. While there is no evidence before the Tribunal which might lead to the conclusion that the grantee party will not act in accordance with its stated intentions, those stated intentions are broadly expressed, and so are of little assistance to the Tribunal in terms of the question of interference in relation to s 237 of the Act.

Grantee party contentions and evidence

[36] The grantee party's statement of contentions responds to the contentions and evidence provided by the native title party, and outlines its obligations under the regulatory regime.

[37] In relation to heritage, the grantee party states that the Government party 'is at liberty to impose a 'proposed RSHA condition' on the tenement' (GP Contentions, paragraph

23), however I note that the Government party's contentions and evidence do not state that an 'RSHA' (Regional Standard Heritage Agreement) condition will be imposed on the proposed licence.

[38] The grantee party submits that it has never been prosecuted or accused of a breach under the *Aboriginal Heritage Act* 1972 (WA) ('AHA'), and that its attitude to the protection of Aboriginal heritage and the steps it is prepared to take to minimise the likelihood of interference with sites should be taken into consideration by the Tribunal (GP Contentions, paragraphs 30 and 31).

[39] In relation to the proposed exploration activity, the grantee party states that it plans 'to undertake the usual activities associated with exploration licenses' including field reconnaissance, geological mapping, surface geophysics, low impact broad spaced hand auger drilling, collection of samples for core assays, soil sampling and surveys (GP Contentions, paragraph 47).

[40] The grantee party outlines that the proposed licence, being approximately 163 square kilometres, is relatively small in the context of the much larger native title party determination area (being approximately 24,284 square kilometres) and that this is a relevant consideration in relation to the likelihood of exploration interfering with community or social activities.

[41] The grantee party notes that much of the native title party's contentions and evidence is centred on activities which take place in or along the Fitzroy River. The grantee party contends that, as a registered site under the AHA and as a National Heritage place under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), the Fitzroy River is afforded high level protection in order to prevent certain types of interference or disturbance.

Considering the evidence

Community or social activities (s 237(a))

Contentions and evidence in relation to s 237(a)

Native title party

[42] Noting that the community and social activities are to be a manifestation of the claimed native title rights and interests, the native title party (at paragraphs 13 and 16 of its contentions) contends that the evidence establishes members of the native title party: hunt and camp in the proposed licence area; conduct intergenerational cultural teaching; and collect bush tucker, medicine and other products. The native title party submits that the evidence it has provided 'deposes to the high probability that the Grant will interfere directly with the carrying on by the NTP of their community or social activities' (NTP Contentions, paragraph 15).

[43] Ms Charles states that the community in which she resides is located 'about half an hours drive from Langey Crossing' and has approximately 150 residents who access the proposed licence area regularly (Charles Affidavit, paragraph 9). She states that residents of Lower Liveringa and Mount Anderson also regularly visit the proposed licence area. She states that it was two weeks ago that people from her community had last camped overnight on the river in the vicinity of Langey Crossing (Charles Affidavit, paragraph 10).

[44] Evidence that members of the native title party regularly visit and access the proposed licence area has not been contested by the Government party or the grantee party, and I accept that Ms Charles' references to Langey Crossing (or *Langi Langi*) are references to the broader area which includes parts of the Nyikina Mangala determination area located on either side of the Fitzroy River and the portion of the river immediately south of Langey Crossing, given that she refers to the area of and around Langey Crossing as being important to the native title party.

[45] Ms Charles describes the proposed licence area as an important place for fishing due to the breadth of food available in this particular location, and the ability to access the area all year round. Specifically, Ms Charles states:

- ‘The Fitzroy River in the exploration licence area is where the salt water and the fresh water meet, at different times of the year the salt water pushes the fresh water back. This is the best access place for us to catch salmon’ (Charles Affidavit, paragraph 14);

- The part of the Fitzroy River ‘where the salt water and fresh water meet is the only place my community can access such a breadth of different aquatic animals for food because it provides access to both salt and fresh water animals depending on what season it is’ (Charles Affidavit, paragraph 15);

- Barramundi *wanja* can be caught in the wet season while catfish *baraloo,* brim, whisker salmon, sting ray *biya,* fresh water crocodiles *gwania* and swordfish *biel biel* are caught in the dry season;

- ‘*Langi Langi* is the only place my community can access during the wet season as the road does not get flooded and the fishing is good there all year round’ (Charles Affidavit, paragraph 16); and

- During the wet season many people come to *Langi Langi* to fish because of the easy access (Charles Affidavit, paragraph 17).

[46] The native title party submits that the ‘unique qualities’ of the proposed licence area ‘diminishes any relevance of a comparative analysis of how big the claim area is compared with the size of the [proposed tenement]’, referring to the Tribunal’s findings in *Freddie v Kingx* at [39] (NTP Contentions, paragraph 21).

[47] Ms Charles deposes that the proposed licence area is used for hunting by the native title party. She states that the proposed licence area is where she learnt about traditional hunting and describes various animals that can be found there, including bush turkey. Ms Charles states:

- ‘My sons hunt on both sides of the highway. They have started to hunt bush cats using traditional methods but I will not eat the cats’ (Charles Affidavit, paragraph 23);

- ‘In the flat to the north of the highway is a lot of *moongoo,* ant hills, this is excellent for finding goanna in the wet season’ (Charles Affidavit, paragraph 24); and

- ‘From the highway towards the Fitzroy is very good hunting for bush turkey which is where my son in law caught a turkey for me the day before yesterday’ (Charles Affidavit, paragraph 25).

[48] Ms Charles attests to the native title party regularly using the proposed licence area for camping. She states ‘[a]t telegraph pool there is a large boab tree and it is a good place to camp on the sand. We do a lot of camping there which is in the north near the Fitzroy and other places along the Fitzroy’ (Charles Affidavit, paragraph 26). Tribunal mapping confirms the location of Telegraph Pool in the northern section of the proposed licence along the edge of the Fitzroy River.

[49] Ms Charles states that the native title party use the proposed licence area for intergenerational teaching and cultural preservation, such as teaching the craft of living on country, hunting and gathering and passing on cultural stories. She states ‘I learnt about Nyikina Mangala traditions and hunting and gathering on the exploration licence area and I know my sons teach their children on the exploration licence area now’ (Charles Affidavit, paragraph 29).

[50] Ms Charles states that the proposed licence area is used by the native title party for collecting certain woods and bush products, in particular the wood of the boomerang tree, *daranga,* and a special white clay, *doognun*, used as a ceremony paint during corroborees, dances and funeral times. She states ‘we park at Langey and then walk further towards the highway along the river to find special white clay for ceremony time. There is a little bit of white clay near telegraph pool (which is also in the exploration licence area) but most of the clay is as I describe down from *Langi Langi*’ (Charles Affidavit, paragraph 31). Ms Charles also states that ‘[t]he exploration licence area is the best place to find wood for boomerangs’ (Charles Affidavit, paragraph 32).

[51] Ms Charles attests to the frequency in which the exploration licence area is used, stating that community and social activities are conducted there in different ways throughout the year. She states that families visit the area every weekend and also

during the week when people have access to vehicles. She states '[a]t this time of year at least 3 car loads of people go out onto the exploration licence area for hunting and fishing every weekend' and that '[d]uring the wet season Nyikina Mangala people go there from all over out lands as it is the only place you can access for fishing' (Charles Affidavit, paragraph 35). She also states that Yeeda station let them access the Fitzroy [River] in the proposed licence area from the north east side of the tenement.

[52] Ms Charles deposes that exploration in the proposed licence area will interfere with the above community and social activities in a number of ways. She states '[e]xplorer's activities will interfere with day camping activities if we do not know where they are operating and when as well as strangers presence affecting how animals in the area behave' (Charles Affidavit, paragraph 27). She also states '[e]xplorer's activities can interfere with our supply of *doognun* and *daranga* if they do not know what it is, they could clear areas with these special products or affect our access to them' (Charles Affidavit, paragraph 33).

[53] The native title party contend that, in circumstances where tenements have previously been granted over the proposed licence area, the Tribunal should not necessarily conclude that disturbance has occurred as a result. Rather, the nature and extent of past or continuing mining activities should be divulged before the Tribunal is persuaded to consider whether there has been interference caused by these activities relative to s 237(a) considerations (NTP contentions, paragraph 26, citing *Money v Britten* at [54]). The native title party further contend that, even in situations where such evidence is provided and former grants are shown to have either already interfered with community and social activities to some extent or that they coexisted without interference, 'an inquiry into section 237(a) is not one which the [native title party] needs to establish ongoing connection and social and community events uninterrupted' (NTP Contentions, paragraph 27). The native title party argues that it is plausible that the native title party may be engaging in these activities more frequently now than at other times and the task of the Tribunal is to determine the likelihood of interference with these activities given the current use of the area.

[54] The native title party contentions, supported by the affidavit of Ms Friedewald, state that the grantee party has not provided any specific information to the native title

party regarding its proposed activities over the proposed licence area, nor has any information been provided which would indicate how the grantee party intends to consult with the native title party, should the licence be granted (NTP Contentions, paragraph 28-30).

Government party

[55] The Government party accepts that community and social activities are carried out on the proposed licence, based on the affidavit evidence of Ms Charles. However, the Government party contends there is not likely to be direct interference with the identified activities for the following reasons:

(a) The grantee party has indicated that most of the proposed exploration activities will be low-level and non-intrusive, and that any ground disturbing activities are intended to be conducted in a way which will not adversely impact on heritage sites (GVP Contentions, paragraph 64(a)).

(b) There are other interests, including pastoral and mineral exploration interests, over the proposed licence area. The evidence suggests the native title party's activities have been subject to, or coexistent with the activities of these other interests for some time and the effect of the proposed licence is likely to be the same as, or no more significant than, the previous and continuing use of the area (GVP Contentions, paragraphs 64(b)-(c)).

(c) There are no Aboriginal communities within the proposed licence area (GVP Contentions, paragraphs 64(d)).

(d) Any real disruptive effect to the native title party's activities is unlikely given the relatively low-scale and apparently infrequent exploration activities planned, particularly given the grantee party's intention to conduct its activities with regard to its statutory obligations and the conditions and endorsements to be imposed on the proposed licence. While it may be possible for the activities of the native title party and grantee party to come into contact from time to time, it is not apparent that the activities of the native title party will be prevented or disrupted to any significant extent (GVP Contentions, paragraphs 64(e)).

(e) Hunting and mineral exploration activities are, by their nature, inherently capable of coexistence (GVP Contentions, paragraph 64(f)).

(f) An exploration licence does not carry a right to control access to land and the slight risk that the grantee party might physically be in the way of a member of the native title party in relation to the small area of land where it is operating on a given day is not substantial enough to constitute interference in the s 237(a) sense (GVP Contentions, paragraph 64(h).

(g) To the extent that the native title party conducts law ceremonies within the proposed licence area, the activities of the grantee party and the native title party will only potentially intersect in the limited period during which law business is held. Although it may be assumed, in the absence of any cooperation between the parties, that there may be a small possibility that the grantee party could inadvertently approach near ceremony while it is occurring (GVP Contentions, paragraph 64(i)).

Grantee party

[56] The grantee party contends that the exploration to be conducted is not likely to substantially impact the community or social activities of the native title party. It states:

- The tenement application is for an exploration licence and therefore only allows for exploration activity as defined by the *Mining Act 1975* (WA) ('*Mining Act*'). As such, the grantee party would not have rights to exclusive possession or access. Further, any restrictions to the native title party's activities would be temporary and of a practical nature for safety reasons, limited to the area where exploration is taking place (GP Contentions, paragraph 45-46);

- The proposed exploration activities are the 'usual activities associated with exploration licences' including field reconnaissance, geological mapping, surface geophysics, low impact broad spaced hand auger drilling, collection of samples for core assays, soil sampling and surveys. The ground disturbing work will be broad based (GP Contentions, paragraph 47);

- The grantee party is aware that any rights for production or resource development would require further extensive consultation with the native title party (GP Contentions, paragraph 48);

- In the context of the larger determined area of Nyikina Mangala, the proposed licence area is relatively small, therefore there will remain large tracts of land where these activities can be carried out (GP Contentions, paragraph 50-51);

- The grantee party's on-ground activities are unlikely to be frequent or cover large areas (GP Contentions, paragraph 53);

- Many of the community and social activities outlined by the native title party are centred in or along the Fitzroy River. The grantee party notes, as a registered site, the Fitzroy River is afforded particular protections under the AHA, and as a National Heritage Place it is afforded particular protections under the EPBC Act (GP Contentions, paragraph 54-56);

- The proposed licence area has been subject to a number of prior and existing interests, including some 12 previous mining tenements, two live tenements, two pastoral leases and a number of Crown Reserves, which would have already restricted the native title party's activities to some extent. To support this contention, the grantee party has provided a 2011 ASX Quarterly Report of Heron Resources Ltd ('Heron'), who held a wholly overlapping tenement, E04/1727, from 2008 to 2013. The report states that Heron completed 2200 metres of RC drilling 'at shallow depth over a tested strike of 14 kilometres' within E04/1727 (GP Contentions, paragraph 58-59 and Annexure C) – however, I note there is little indication as to where those activities were conducted within the proposed licence, or how many drill holes the 2,200 meters of drilling translates to;

- The native title party's rights do not automatically exclude access to the area by strangers and the proposed licence area is accessible, for purposes wholly unrelated to exploration, via a major highway and two stock routes that cross through the proposed licence area as well as a Resting Place for Travellers and Stock (GP Contentions, paragraph 70);

- In response to the native title party's concern that exploration activities can interfere with their supply of *doognun* and *daranga,* either through clearing or by affecting access, it states the proposed licence would not afford the grantee party with exclusive possession or the right to exclude access. Further, the grantee party is aware of its obligations under the regulatory regime, in particular the *Environmental Protection Act 1986,* and the offences and penalties associated with any unlawful clearing or interference with native vegetation (GP Contentions, paragraph 81-83).

Native title party reply

[57] The native title party's contentions in reply state that the grantee party's characterisation of its proposed exploration activities as 'the usual activities' does not provide any detailed information regarding the particular exploration work planned. Therefore, the Tribunal should infer that the grantee party will excise their rights under the *Mining Act* to the full (NTP Reply, paragraph 2). I agree with this contention.

[58] The native title party challenges the grantee party's contention regarding the protections the Fitzroy River will be afforded under the EPBC Act. It states that this Act provides limited protection. For instance (but not exclusively) interference with the activities discussed in the native title party's contentions would not be protected under the EPBC Act as they do not relate to the National Heritage Value of the river (NTP Reply, paragraph 3).

[59] The native title party states that reference to past and live grants over the proposed licence is of no probative value without consideration as to whether those grants are covered by heritage protection agreements. It states that the grantee party has no knowledge of the arrangements that the holders of those tenements have with the native title party to facilitate heritage protection (NTP Reply, paragraph 4).

[60] The native title party also refutes the Government party's conclusion that 'some (or most) of these interests are likely to have extinguished at least any native title rights to control use of and access to the relevant land' (GVP Contentions, paragraph 64(c)) because the tenement has pastoral interest covering it. It states that this conclusion is inconsistent with the affidavit evidence of Ms Charles (NTP Reply, paragraph 6).

[61] The native title party also rejects the Government party's contention's (as outlined at [55] above) regarding the planned exploration activities of the grantee party. It states the grant of the proposed licence enables the explorer to partake in activities which are not 'relatively low-scale' or 'infrequent' (NTP Reply, paragraph 7).

Consideration of s 237(a)

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

[63] I have taken into consideration that the following appears on the Extract from the National Native Title Register for the native title party determination, which relates to community and social activities:

Exclusive native title rights and interests

5. Subject to paragraphs 7, 8 and 9 the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule Three, being areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded, are:

(a) except in relation to flowing and underground waters, the right to possession, occupation, use and enjoyment of that part of the Determination Area to the exclusion of all others; and

(b) in relation to flowing and underground waters, the right to use and enjoy the flowing and underground waters, including:

  (i) the right to hunt on, fish from, take, use, share and exchange the natural resources of the flowing and underground waters for personal, domestic, cultural or non-commercial communal purposes;

  (ii) the right to take, use, share and exchange the flowing and underground waters for personal, domestic, cultural or non-commercial communal purposes.

Non-exclusive rights and interests

6. Subject to paragraphs 7, 8 and 9, the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule Four, being areas where there has been a partial extinguishment of native title and where any extinguishment is not required to be disregarded, are that they confer the following non-exclusive rights on the Native Title Holders, including the right to conduct activities necessary to give effect to them:

(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, camp and erect shelters and other structures for those purposes on the Determination Area referred to in Schedule Four;

(c) the right to:

  (i) hunt, gather and fish for personal, domestic, cultural and non-commercial communal purposes;

  (ii) take and use flora and fauna for personal, domestic, cultural and non-commercial communal purposes;

(iii) take, use, share and exchange the natural resources of each part of the Determination Area referred to in Schedule Four including soil, sand, clay, gravel, ochre, timber, charcoal, resin and stone for personal, domestic, cultural and non-commercial communal purposes;
(iv) engage in cultural activities in the area, including the transmission of cultural heritage knowledge;
(v) conduct and participate in ceremonies;
(vi) hold meetings; and
(vii) visit, maintain and protect from physical harm, areas, places and sites of importance in each part of the Determination Area referred to in Schedule Four.

7. The native title rights and interests referred to in paragraphs 5(b) and 6 do not confer:
(a) possession, occupation, use and enjoyment of those parts of the Determination Area on the Native Title Holders to the exclusion of all others; nor
(b) a right to control the access of others to the land or waters of those parts of the Determination Area.

8. Notwithstanding anything in this Determination there are no native title rights and interests in the Determination Area in or in relation to:
(a) minerals as defined in the Mining Act 1904 (WA) (repealed) and the Mining Act 1978 (WA); or
(b) petroleum as defined in the Petroleum Act 1936 (WA) (repealed) and the Petroleum and Geothermal Energy Resources Act 1967 (WA);
(c) geothermal energy resources and geothermal energy as defined in the Petroleum and Geothermal Energy Resources Act 1967 (WA); or
(d) water lawfully captured by the holders of Other Interests,

except the right to take and use ochre to the extent that ochre is not a mineral pursuant to the Mining Act 1904 (WA).

9. Native title rights and interests are subject to and exercisable in accordance with:
(a) the laws of the State and the Commonwealth, including the common law; and
(b) the traditional laws and customs of the Native Title Holders for personal, domestic, cultural and non-commercial communal purposes (including social, religious, spiritual and ceremonial purposes).

[64] The native title party has provided detailed evidence, not merely general or unspecified, about the community and social activities carried out within the area of the proposed licence, and particularly those activities on or near Langey Crossing. Ms Charles has described the activities that are regularly carried out on the proposed licence including hunting, camping, fishing and teaching cultural practices. The evidence about hunting and teaching cultural practises is broad, and I do not conclude that the native title party has established that hunting is done here in such a way that it could not be similarly done in other parts of the determined area, with the exception perhaps of the goanna attracted to the ant hills to the north of the highway. Similarly, I do not accept the native title party has established that collecting wood and bush products is done uniquely on this proposed licence, apart from accepting the area is good for collecting the boomerang tree wood, which is relevant to songline activities.

[65] Ms Charles has provided details about the numbers of people using the area and the frequency in which they are travelling there, particularly for fishing and camping. Ms Charles has also provided evidence that demonstrates why the proposed licence area in particular (as opposed to the broader determined area) is important for these

activities, including that it is easily accessible, even during the wet season when many places are inaccessible, and it is the section of the Fitzroy River where the fresh water meets the salt water, therefore, being the only place where both fresh water and salt water aquatic animals can be caught.

[66] The grantee party has contended that activities said to be conducted more generally across the proposed licence are likely to be able to be conducted in other parts of the proposed licence or determined area if exploration activities were to impact them at a particular site. The grantee party has also stated they believe their activities will be of a low impact nature and will be the 'usual' activities of an explorer. Recently, Member McNamara in *Mungarlu Ngurrarankatja Rirraunkaja v FMG Pilbara* (at [71]) pointed to the grantee party evidence in that matter which suggested 'the grantee party intends to carry out a range of activities in the initial phase of its exploration program...'. He referred to the previous Tribunal decision in *Walley v Brosnan* (at [22]), and noted this decision held that evidence of this nature is of limited assistance to the Tribunal, as '[a]ll it indicates is that the grantee's present intentions are limited to extremely low impact activity which may result in higher impact activity should the initial exploration activities prove fruitful'.

[67] I believe the native title party has demonstrated, in particular in relation to camping and fishing, that the area is an important one to the native title party, particularly around Langey Crossing, and the activities cannot be carried out to the same extent or with the same benefits in areas outside the proposed licence, or elsewhere within that proposed licence. While camping is said to be done at 'other places along the Fitzroy', the unique fishing qualities of the area, and the proximity to Pandanus Community, suggests there is an intensity to the regular use of the area and for the day camping for fishing, and also to some extent for the collection of white clay near Langey.

[68] This intensity is also suggested by evidence Ms Charles has presented in relation to s 237(b) of the inquiry, which outlines two songlines related to the area, and that one songline is related to the boomerang tree and its use, and the area she describes is the 'best' place to find this wood 'even now' (at 47). There is no evidence as to whether or how much vegetation the grantee party will clear, and endorsements and conditions may not protect the tree sufficiently given its importance to the native title party. The area was used for the hearing of the native title claim determination, and there are two

other communities relatively near to the proposed licence. Having come to this conclusion, I must now consider whether it is likely these activities will be directly interfered with by the grant of the proposed licence.

[69] As outlined in the affidavit of Ms Friedewald, no information has been provided to the native title party regarding the grantee party's proposed exploration program. I agree with the native title party's contention that the grantee party has only provided very general information about the activities it intends to carry out on the proposed licence. Therefore, I will presume it will exercise the rights conferred by the grant to their full extent (see *Silver v Northern Territory* at [25]-[32]). This includes rights to carry on such works as are necessary for the purpose of exploring for minerals, including: digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for that purpose; and to excavate, extract or remove such land, earth, soil, rock, stone, fluid or mineral bearing substances up to the prescribed amount of 1,000 tonnes (see *Mining Act 1978* (WA), s 66; *Mining Regulations 1981* (WA), reg 20).

[70] Regard is to be given to the temporary nature of exploration, the size of the proposed licence, and the finding in previous Tribunal decisions that exploration activity, in the usual course of events, is not likely to interfere with community and social activities. The previous exploration permit E04/1727 referred to by the grantee party (see [56] of this decision) was operative between 2008 and 2013 and wholly overlapped the proposed licence. The grantee party has provided some information on activities undertaken under that grant; however, without further detail about the nature, extent or location of those activities, limited consideration can be given to this information. I have considered the native title party's argument that past and live grants may have been subject to Heritage Protection Agreements, although the native title party have not advised whether there are agreements in place with those explorers, citing this information as 'commercially confidential' (NTP Reply, paragraph 4).

[71] The native title party have also argued that the proposed licence area is potentially used more today than it may have been in the past, citing Ms Charles at paragraph 13: '...regardless of what has happened in the past, now this year the current generations use the exploration licence area for our community and social activities...'. The native title party is correct in asserting that it is not their task in this inquiry to establish ongoing and uninterrupted connection and activities, however, the evaluation the

Tribunal must make is contextual and, therefore, consideration must be given to any constraints already imposed on the native title party's activities by third parties (*Smith v Western Australia* at ([27]).

[72] In considering the impact of past and present underlying tenure, I accept there is likely to have been some interference with the native title party's community and social activities. However, the evidence suggests that this interference has not been substantial and from the contested evidence of the native title party, there appears to have been few constraints on the native title party activities to date.

[73] I do not give much weight to the argument put forward by the Government party that interference is unlikely as there are no Aboriginal communities within the proposed licence (GVP contentions at 64(d). Ms Charles' affidavit, supported by Tribunal mapping, indicates there is one community where members of the native title party reside (including Ms Charles), which is located approximately 12 kilometres from the proposed licence. There are at least two more such communities within 50 kilometres of the proposed licence. Therefore, I am satisfied that this is an area where the native title party is active, and which forms something of a hub of community and social activities for the native title party.

[74] Evidence has been led by the native title party that to date there has been no consultation by the grantee party, for example, in regards to establishing a heritage protection regime. There is also no evidence before me which suggests an RSHA has been offered to the native title party by the grantee party, although this goes more to s 237 (b) interference than s 237 (a). With the application of the expedited procedure, the grantee party could perform exploration activities with the full suite of rights allowed to it under the *Mining Act*, within close proximity to Langey Crossing, which is likely to restrict the activities of the native title party to a substantial extent.

[75] As outlined at [1] above, the proposed licence was notified as an act that can be done without the negotiations required by s 31 of the Act, therefore, the grantee party has been under no obligation to consult with the native title party. Similarly, there is nothing in the Act which requires the grantee party to offer or enter into an RSHA with the native title party. However, evidence of the grantee party's intentions and conduct may well be relevant to the predictive assessment required under s 237 of the

Act, as noted earlier in this determination. The grantee party has indicated it will comply with the relevant regulatory regime and this is likely to involve some consultation with the native title party. However, I am not satisfied that the consultation required under the regulatory regime will be sufficient in this instance. For example, the AHA is concerned with the preservation of Aboriginal sites and objects, rather than preventing interference with the social and community activities of the native title party. Given the specific nature and extent of community and social activities which are stated to occur in the proposed licence, and its unique features as compared to areas outside the proposed licence, I conclude that interference with such activities is likely to occur without consultation with the native title party.

[76] Taking all of the evidence into account, including the nature and extent of activities on the proposed licence, in comparison with surrounding areas, I find that the act is likely to interfere directly, and in a substantial and not trivial way, with the carrying on of community and social activities by the native title party under s 237(a) within this proposed licence.

Sites of particular significance (s 237(b))

Contentions and evidence in relation to s 237(b)

[77] The native title party contentions argue that, given the scope, location and special knowledge the native title party has of the proposed licence, interference is likely to occur, notwithstanding the effect of the relevant regulatory regimes (NTP Contentions, paragraph 32).

[78] The native title party's contentions state the evidence establishes: members of the native title party consider the Fitzroy River as a significant site; the *Lingoorda* story and the *Winjabool* story and songline are significant to the native title party and both relate to the area of the proposed licence; and the native title party have significant birthing places within the proposed licence (NTP Contentions, paragraph 48).

[79] In relation to the Fitzroy River, Ms Charles states (at paragraphs 39-41):

- It is central to the native title party's cultural identity. She states 'we call ourselves *martuwarra*, connected to the river';

- The river provides life to the native title party and they rely on the foods collected out of the river and the animals that are drawn to the river, particularly when other water sources dry up during the dry season;

- Traditional laws state the native title party must protect the river from outside interference and activities otherwise the dreamtime snake *nglagundi* of the river could change the course of the river and flood her community. Ms Charles states that her community is particularly at risk of these consequences given how close it is to the river.

[80] Ms Charles states that *Lingoorda* is a significant story of a crocodile from the dreamtime. She states (at paragraph 43), '[h]e went through Langey Crossing *Langi Langi* looking for his children the whistling ducks. Where he found his children is inside the exploration licence area'.

[81] Ms Charles states that the proposed licence area is at the beginning of *Winjabool's* song and story so is the beginning of the native title party's understanding and naming of country. She states that:

- *Winjabool* was a mapping man from the dreamtime *Goodadagada* who walked over the native title party's country singing songs and naming places, and 'his song is the way that we know what to call places and how each parts [sic] of Nyikina Mangala country is related (Charles Affidavit, paragraph 44);

- 'The song that he created and sang through the exploration licence area was sung at our Native Title Determination and is a significant song during initiation ceremony times' (Charles Affidavit, paragraph 45);

- *'Winjabool* took the *Magala* tree from *Mulinmulin* then he walked along the river planting *Magala* trees and singing songs' (Charles Affidavit, paragraph 46);

- 'When *Winjabool* was in the proposed licence area on the north side of the highway he made boomerangs out of the boomerang tree which is there. This part

of the licence area is the best place to find the wood which we use to make boomerangs even today' (Charles Affidavit, paragraph 47);

- The proposed licence area is so significant to his story as there are a couple of songs which he named and sang along the Fitzroy in the proposed licence area and this was where he sent his boomerangs out to other people and lands (Charles Affidavit, paragraph 49);

- The song of *Winjabool* is central to law ceremony time and is taught to young men during law ceremony. The song is at the centre of boys becoming men which is the basis of our community structure, our individual roles and responsibilities (Charles Affidavit, paragraph 50);

- 'The reason *Langi Langi* was chosen for the native title determination is because that is where the song started it is where the Nyikina Mangala story begins' (Charles Affidavit, paragraph 52); and

- 'Once a song line is interfered with or broken there is no way we can fix it... An explorer could interfere with this line by going to the country without proper welcome and without guidance to where the song changes...There would be at least three different points in the exploration licence area where the song line changes. Our whole traditional ceremony coming into law could be damaged which is the foundation upon which we operate as a community and understand our position in our community' (Charles Affidavit, paragraph 53)

[82] Ms Charles states that there is a large boab tree she can locate near *Langi Langi* which is where her mother was born and that she knows this birthing place because it is important to her people. She states that she has a special obligation to care for the places her family have been born and that birthing places are where a persons' *rei*, their baby spirits, come into the community in human form (Charles Affidavit, paragraph 54).

[83] Ms Charles states '[t]he best way to protect these places under our law and white law is to have an agreement with companies who want to explore the area' (Charles Affidavit, paragraph 56).

[84] The Government Party contends that insufficient evidence has been provided to demonstrate the sites described in the native title party's contentions and the affidavit of Ms Charles are sites of 'particular significance'.

Consideration of s 237(b)

[85] I agree with the Government party that the native title party has not provided sufficient evidence to show the sites referred to are sites of particular significance for the purposes of s 237(b) of the Act. Broadly speaking, the material provided by the native title party does not satisfy the requirements of s 237(b), but has added weight to the contention that the area of Langey Crossing and surrounds, within the proposed licence, is an area which is of importance to the native title party as a hub of social and community activities, for the purpose of s 237(a) of the Act.

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

[86] The native title party has made no specific contentions on the issue of major disturbance. Consequently, neither the native title party nor the Government party has addressed s 237 (c) of the Act. Nonetheless, the original objection raised this limb of s 237 of the Act, and the Tribunal is required under s 237(c) to make an evaluative judgment of whether major disturbance to land and waters is likely to occur (in the sense that there is a real risk of it) from the point of view of the entire Australian community, including the Aboriginal community, taking into account the concerns of the native title party (see *Little v Oriole Resources* at [41]-[57]).

[87] In the present matter, there is no evidence of any special topographical, geological or environmental factors that might lead members of the Australian community to believe that the proposed licence would result in major disturbance to the land and waters concerned. As such, looking at the proposed future act, and the effect of the rights created by that future act, I do not conclude there is a real chance or risk of major disturbance to land and waters, for the purposes for s 237 (c) of the Act.

Determination

[88] The determination of the Tribunal is that the act, namely the grant of exploration licence E04/2335 to Dempsey Minerals Ltd, is not an act attracting the expedited procedure.

Helen Shurven
Member
18 May 2015