

NATIONAL NATIVE TITLE TRIBUNAL

Walalakoo Aboriginal Corporation RNTBC v Kallenia Mines Pty Ltd and Another [2017] NNTTA 53 (1 September 2017)

Application No: WO2016/0420

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

- and -

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

Walalakoo Aboriginal Corporation RNTBC (WCD2014/003)
(native title party)

- and -

Kallenia Mines Pty Ltd
(grantee party)

- and -

State of Western Australia
(Government party)

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

Tribunal: Member Shurven
Place: Perth
Date: 1 September 2017

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act is likely to directly interfere with the carrying on of community or social activities – whether act is likely to interfere with sites or areas of particular significance – whether act is likely to involve major disturbance to land or waters – expedited procedure does not apply

Legislation:

[Aboriginal Heritage Act 1972 \(WA\)](#)

[Mining Act 1978 \(WA\)](#) s 66

[Native Title Act 1993 \(Cth\)](#) ss 31, 32, 146, 150, 151, 237

Cases:

Cheinmora v Striker Resources NL [\[1996\] FCA 1147](#) ('*Cheinmora v Striker Resources*')

FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation RNTBC [\[2014\] FCA 1335](#) ('*FMG v Yindjibarndi*')

Griffiths v Northern Territory [\[2007\] FCAFC 178](#); 165 FCR 391; ('*Griffiths v Northern Territory*')

Josephine Forrest on behalf of Yi-Martuwarra Ngurrara; Butcher Wise on behalf of the Kurungal Native Title Claimants; Gooniyandi Aboriginal Corporation/Western Australia/Brockman Exploration Pty Ltd [\[2013\] NNTTA 100](#) ('*Forrest v Gooniyandi*')

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

Yi-Martuwarra Ngurrara; Butcher Wise & Ord on behalf of the Kurungal Native Title Claimants: Gooniyandi Aboriginal Corporation/Western Australia/Brockman Exploration Pty Ltd [\[2013\] NNTTA 100](#) ('*Yi-Martuwarra Ngurrara v Brockman Exploration*')

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

Yindjibarndi People v Western Australia [\[2017\] FCA 803](#) ('*Yindjibarndi v Western Australia*')

Walalakoo Aboriginal Corporation RNTBC v William Robert Richmond and Another [\[2015\] NNTTA 48](#) ('*WAC v Richmond*')

Ward v Western Australia [\[1996\] FCA 1452](#); (1996) 69 FCR 208 ('*Ward v Western Australia*')

Watson on behalf of the Nyikina Mangala People v Western Australia (No 6) [\[2014\] FCA 545](#) ('*Nyikina Mangala People v WA*')

Representative of the native title party:

Ms Gemma Acland, Kimberley Land Council

Representatives of the grantee party:

Mr Bill Richmond
Mr Tim Kavenagh, Kavenagh Legal

Representatives of the Government party: Mr Matthew Smith, Department of Mines, Industry Regulation and Safety
Ms Sarah Power, State Solicitor's Office

REASONS FOR DETERMINATION

Background

[1] This is a decision about whether or not the expedited procedure applies to the grant of exploration licence E04/2428 (the licence) to Kallenia Mines Pty Ltd (Kallenia Mines). Mr Richmond is the sole Director/Secretary of Kallenia Mines. When the State of Western Australia gave notice of the proposed licence grant, they included an assertion that the grant of the licence attracts the expedited procedure. In summary, s 237 of the *Native Title Act 1993* (Cth)¹ (the Act) states that the expedited procedure applies to a licence that is not likely to:

- (a) interfere directly with the carrying on of the community or social activities of the native title party;
- (b) interfere with areas or sites of particular significance to the native title party in accordance with their traditions; and
- (c) involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance.

[2] The Nyikina Mangala People's native title determination (WCD2014/003) wholly overlaps the licence and they hold exclusive native title rights and interests in the determination area (see *Nyikina Mangala People v WA*). These rights and interests include the right to possess, occupy, use and enjoy the area to the exclusion of all others. Walalakoo Aboriginal Corporation RNTBC (Walalakoo) holds the native title rights and interests on behalf of the Nyikina Mangala People. Walalakoo exercised their right (under s 32) to lodge an objection with the National Native Title Tribunal against the State's assertion that the expedited procedure applies. The President of the Tribunal, Raelene Webb QC, appointed me to conduct an inquiry to determine whether or not the expedited procedure applies. The Tribunal facilitated discussions under s 150, to provide parties with an opportunity to resolve some or all of the issues in dispute, but they were unable to reach agreement and the inquiry process proceeded.

¹ All references to sections of legislation in this determination are to the *Native Title Act 1993* (Cth) unless otherwise stated.

- [3] If I decide the expedited procedure applies, the licence can be granted without the requirement for negotiation between the parties. If I decide it does not apply, the ‘right to negotiate’ provisions under the Act apply. For the reasons detailed below, I have decided the expedited procedure does not apply to grant of the proposed licence. Accordingly, Kallenia Mines and the State must negotiate with the Nyikina Mangala People in good faith with a view to reaching agreement in relation to the grant of the licence, as required under s 31.

Information and evidence provided by the parties

- [4] I issued directions requiring parties to provide contentions and evidence. All parties lodged contentions and supporting material, and I allowed Walalakoo to submit a reply in relation to the State and Kallenia Mines’ contentions. I make the following observations in relation to these materials.
- [5] Mr Richmond provided the contentions and supporting material for Kallenia Mines. Mr Richmond holds a previously granted tenement (E04/1998) that is adjacent to and has an adjoining west boundary with the proposed licence in this matter. The materials indicate Kallenia Mines intends to explore for resources from that previously granted tenement, into and across the licence currently under inquiry.
- [6] Kallenia Mines’ contentions provide broad material in relation to the exploration industry in the area, and make few specific submissions in relation to the licence in this matter. Kallenia Mines attached four sets of documents to its contentions, each with over 40 pages of attachments. These attachments include annotations and highlighted material, which do not seem to correspond systematically with the submissions in Kallenia Mines’ contentions. Much of the material seems to relate to other tenements and other arbitral matters, or to unspecified tenements. Despite these difficulties, I have considered the material and commented where aspects appear to have relevance.
- [7] The Walalakoo contentions attach an affidavit of Ms Annie Milgin affirmed on 27 April 2017. Ms Milgin states she is from the Jarlmadangah community and is a Nyikina Mangala traditional owner through her father’s side. Her affidavit relates to the licence in this inquiry, and attaches a map of the licence and surrounds. I note Jarlmadangah is approximately 30 kilometres north-east of the licence. Ms Milgin states she is a senior

Nyikina Mangala woman and the daughter of a senior Nyikina Mangala man. I accept Ms Milgin has authority to speak for the area of the licence on behalf of the Nyikina Mangala People.

- [8] The Walalakoo reply attached and referred extensively to an earlier affidavit of Ms Milgin, dated 2015 and submitted in relation to a previous Tribunal inquiry, *WAC v Richmond*. I discuss the relevance of this affidavit further below.
- [9] The State's material included contentions, maps and various information about the licence.

Consideration of WAC v Richmond and Ms Milgin's 2015 affidavit

- [10] Kallenia Mines included in their material the Tribunal's 2015 decision of *WAC v Richmond*, which related to the proposed grant of another exploration licence (E04/2358) to Mr Richmond, which covered exactly the same area of land as the licence in the present inquiry. In October 2015, the Tribunal determined that the expedited procedure did not apply to the grant of E04/2358, and Mr Richmond withdrew his application for that licence in December 2015. Materials provided on behalf of Kallenia Mines in this present inquiry include an email from Mr Richmond to the State in December 2015, indicating he had withdrawn E04/2358 and that he may re-apply under the name of his company. It is evident Mr Richmond subsequently pursued this course of action, and his second application involves the licence at issue in this current inquiry.
- [11] In the copy of *WAC v Richmond* that Kallenia Mines submitted for this inquiry, Mr Richmond marked annotations outlining his views of the decision. In their reply, Walalakoo provided statements outlining their views about that decision, asserting that it is relevant and parts of it should be adopted in the current proceedings. Kallenia Mines stated it was concerned that my decision in the 2015 inquiry would influence my decision, or be adopted holus bolus, in this current inquiry.
- [12] In relation to that concern, I note the Tribunal may, at its discretion, adopt any previous determination that may be relevant to its inquiry (pursuant to s 146). During this inquiry process, I made it clear to all parties that I would only consider Ms Milgin's 2015 affidavit to the extent it was referred to in *WAC v Richmond* and in Walalakoo's initial contentions in this inquiry, to which Kallenia Mines had the opportunity to respond.

[13] As it transpired, I have found the evidence and information provided in relation to this present inquiry to be sufficiently comprehensive for me to draw conclusions as to whether the expedited procedure applies. While I have considered Ms Milgin's 2015 affidavit (to the extent outlined in [12] above) and *WAC v Richmond*, I have been able to make my determination with little reference to those materials. Any reference to Ms Milgin's evidence is to her 2017 affidavit, unless otherwise stated.

Conduct of the inquiry

[14] Under s 151(2), I must hold a hearing if the issues for determination cannot be adequately determined in the absence of the parties, though I may otherwise make a determination 'on the papers'. In this matter, I sought parties' preferences for the mode of the inquiry and took these into account in deciding whether to hold a hearing. The State and Nyikina Mangala were content to proceed on the papers. Kallenia Mines stated it wanted the Tribunal to hold a hearing, mainly to focus on its views about whether aspects of Walalakoo reply should be taken into account.

[15] I responded to Kallenia Mines' reasons for requesting a hearing, and considered the material submitted by parties on that point, communicating my position on the information as outlined above at [11]–[12]. I am, therefore, satisfied it is appropriate to decide this matter on the papers, without a hearing, as all points raised by parties relevant to this inquiry could be adequately ventilated through the papers provided.

Established facts and preliminary conclusions

[16] Due to the volume of contentions made in this inquiry, I begin by outlining the following facts that I consider are clearly established on the evidence before me:

- (a) Clanmyra Pool is, at its closest, approximately 500 metres from the proposed licence (Kallenia Mines' materials confirm this, as does mapping and other documents provided by the State and Walalakoo);
- (b) Clanmyra Pool is also known as *Kalanmayi/Kalayanmayi*, as shown in Walalakoo's contentions and the Nyikina Mangala Plan 2012 document;
- (c) Clanmyra Pool is an important and special spiritual place for the Nyikina Mangala People, and it is part of Geegully Creek. Its spiritual significance to the

Nyikina Mangala People is such that strangers must be welcomed to places near to the area appropriately. There is also a camping area nearby known as ‘main camp’. The evidence establishing this includes, for example, a 1981 report provided by Mr Richmond that refers to Clanmyra Pool as a place to be respected, and various reports tabled by Walalakoo that describe its high importance;

- (d) Clanmyra Pool is referred to as *ungur*, or living water, as it is a permanent water hole, and provides an important source of drinking water. As such it is a significant hub for camping, and a starting point for hunting, fishing, and gathering bush foods. These activities extend through the licence (with the exception of fishing). No party has challenged that such social and community activities occur on the licence – what the State and Kallenia Mines challenge is that such activities will be interfered with by exploration activities of Kallenia Mines;
- (e) This hub area and the licence includes ranger activities such as hunting, the Yirraman Project (for at risk youth), and the Sharing Stories Mob – these activities include intergenerational teaching, and men’s business (for example, men take boys through the licence area hunting).

Section 237 criteria

- (a) Is the grant of the licence likely to interfere directly with community or social activities (s 237(a))?**

[17] I may only consider community or social activities that are manifestations of the particular claimed or determined native title rights and interests of the native title party (see *Silver v Northern Territory* at [58]). The Nyikina Mangala People hold exclusive native title rights and interests in the area of the licence.

[18] To explain the nature of exclusive native title rights, I note the recent Federal Court of Australia decision in *Yindjibarndi v Western Australia*, in which Justice Rares reflected on the exclusive rights and interests of a native title party, in that case, the Yindjibarndi people. Justice Rares found the evidence established that a non-Yindjibarndi person or a stranger (a ‘*manjangu*’) must obtain permission from a Yindjibarndi elder before

entering or carrying out any activity on Yindjibarndi country. He found traditional Yindjibarndi laws and customs set out a right, and a duty to the spirits, to consider whether a *manjangu* should be allowed to enter a particular place or carry out any proposed activity. He found the Yindjibarndi people may refuse permission if a stranger's entry or activity is not permitted under traditional laws and customs or if they are not satisfied of the stranger's intentions. He stated this 'was consistent with the concept of spiritual necessity giving rise to a right of exclusive possession' (at [23]). This is consistent with other recent case law (for example, *Griffiths v Northern Territory* at [127]), which recognises exclusive native title where a native title party establish they are the 'spiritual gatekeepers' to an area, for the purpose of avoiding injury to country and preventing harm to strangers in accordance with traditional laws and customs.

- [19] In the present inquiry, Ms Milgin provides evidence that the Nyikina Mangala People have spiritual obligations in relation to the area of the licence, particularly the area near Clanmyra Pool and Geegully Creek. Ms Milgin outlines social and community responsibilities that include controlling the access of strangers to the area, in accordance with the traditions of the Nyikina Mangala People. For example, Ms Milgin states:

It's important under Nyikina Mangala law that we speak for that country and people have to talk to us before they visit it to get permission to be there...

We were taught to protect it and if we can't protect it we could get sick for not protecting the sites and the places where *Wunyambu* and the other Bugarigara creatures are moving across our land. As elders we have to speak for our country and stop any destruction of our sites.

- [20] I accept the Nyikina Mangala People have social and community responsibilities to speak for country and protect sites of importance, which are manifestations of their exclusive native title rights and interests. I also note the nature of these responsibilities and rights may underpin the occurrence of other social and community activities in the area, which I consider in my analysis of s 237(a) interference below.

(i) ***What community or social activities do the Nyikina Mangala People undertake on the proposed licence area?***

- [21] Walalakoo contend the evidence demonstrates a 'not limited' number of Nyikina Mangala People access and use the licence area for various community and social activities. They contend the area has unique qualities, such that the social and

community activities cannot take place elsewhere on the Nyikina Mangala People's determined area.

Camping, hunting and fishing

- [22] Walalakoo's contentions state the Nyikina Mangala People live in the Looma and Jarlmadangah communities, regularly camping at the 'main camp', fishing in the pools and accessing the licence area for hunting. They state that Looma is approximately 40 kilometres from the licence area, and Jarlmadangah (where Ms Milgin lives) is approximately 30 kilometres from it. They regard these distances are relatively close 'given the context, the size of the communities...and the evidence provided of the activities conducted out of these communities'.
- [23] Ms Milgin states, 'People who live at the surrounding communities like Jarlmadangah and Looma can go to the tenement area and near there on a day trip to go hunting and fishing'. I accept it is likely that people from the nearby Aboriginal communities, and other Nyikina Mangala People, access the licence and surrounds to conduct social and community activities (as outlined below).
- [24] Walalakoo's contentions state the main camp is 'located directly across Geegully Creek from the licence'. I note Geegully Creek runs in an approximately north south direction near the eastern side of the licence. As I understand from Nyikina Mangala's description, the main camp is located near the licence on the eastern side of Geegully Creek, though no party has identified how far to that side of Geegully Creek it is. I also understand Clanmyra Pool and the portion of Geegully Creek that is very near the licence is a starting point for social and community activities such as hunting, which extend into the licence. Evidence provided in relation to camping and fishing locates such activities outside the licence at the main camp.

Hunting and gathering

- [25] I have already made comments in relation to hunting, and further expand on those comments here. Walalakoo submit the Nyikina Mangala People hunt and gather bush tucker in the licence area. It is also asserted they collect sugar bag and wattle seeds. Walalakoo state Nyikina Mangala Rangers camp at the main camp and hunt 'from there through the tenement area'. The State argues the evidence is not sufficiently detailed to

establish how often hunting occurs on the licence area, how many people are involved or that it cannot take place on other parts of the native title determination area.

- [26] While I agree hunting and gathering may occur in other parts of the licence, I find the evidence establishes that it occurs with particular intensity in the area near Clanmyra Pool, which is within 500 metres of the licence and is highly significant in accordance with the Nyikina Mangala People's traditions. I address this in further detail below.

Intergenerational teaching

- [27] Walalakoo's contentions state the Nyikina Mangala People also use the licence area to 'conduct intergenerational teaching' and 'for the purposes of transmission of traditional knowledge, such as the Yirraman Project'. Ms Milgin states (at 18):

People from the communities, Nyikina Mangala rangers and people involved with the Yirraman Project use that area a lot. Last year we had a women's camp there, at that main camp. A group of ladies did bush camp as part of the Yirraman Project. The Sharing Stories mob were also there. We bring the young people to that country. They get taught. It is important to go back to country it is part of the healing. We teach kids song and dance. Men do business with the boys and we do woman business. Then the men take boys through that tenement area hunting.

- [28] I agree with the State that there is little evidence that the main camp gender-restricted business is linked to the licence area, but there is sufficient information throughout the affidavit to conclude intergenerational teaching does occur on and near the licence.
- [29] The State accept that transmission of cultural knowledge appears to be engaged at main camp and other areas including the licence area. The State argues some aspects of intergenerational teaching, such as teaching and hunting, *may* occur in the licence area but the evidence is lacking in terms of frequency, how many people, duration and whether it is limited to parts of the licence area.

Reliance on products

- [30] Walalakoo submit 'the evidence demonstrates a reliance on traditional foods from within the tenement area, as well as going further to establish that these activities occur on a regular basis'. They contend 'members of the native title holding community regularly hunt, fish and gather bush tucker from and near the Tenement Area at all times of the year'. Walalakoo assert that the 'continued use of bush tucker from the tenement

area' increases the likelihood of direct interference with community and social activities. In support of this contention, Walalakoo refer to the case of *Yi-Martuwarra Ngurrara v Brockman Exploration*, in which the Tribunal noted that reliance on traditional foods and products can indicate the extent of use of the land or waters for activities related to the hunting and gathering, which affects the likelihood of direct interference.

[31] In distinguishing that case from the circumstances in this inquiry, the State notes there is a distinction between food being used or eaten, and food being a primary source and that continued use of a resource does not constitute 'reliance'. The State also contends there is no evidence of fishing on the licence area and very little detail about hunting and gathering bush tucker. I agree the evidence does not establish reliance.

Unique area

[32] Walalakoo contend the licence is a unique area with inherent qualities that separate it compared with the rest of the determination area. The State challenges this contention and suggests Ms Milgin's evidence establishes some of the activities do occur elsewhere on the determination area. The Nyikina Mangala People say they demonstrate a combination of community and social activities, undertaken in the shadow of the spiritually important Clanmyra Pool, which cannot take place elsewhere on the determination area. In summary, Nyikina Mangala assert the unique qualities of the licence area are due to:

- the main camp being located directly across Geegully Creek from the licence area;
- the proximity of fresh water pools in Geegully Creek, such as Clanmyra Pool;
- the above pools being accessed all year round for drinking water and fishing;
- accessibility to Jarlmadangah and Looma community members;
- it being a good place for obtaining sugarbag and wattle seeds; and
- the carrying out of intergenerational teaching.

[33] Walalakoo state the practicing and passing on of culture within the licence area will be directly interfered with if strangers, including Kallenia Mines, are permitted to enter

unannounced and without prior consultation. It is important to note here that such is not a veto to exploration, and for the expedited procedure to apply, I cannot just accept such evidence without scrutiny. In summary, I conclude the activities of hunting, gathering and intergenerational teaching are social and community activities for the purposes of s 237(a), which are conducted on the licence in a way that relates them to important spiritual areas which are not on, but very near to, the licence. The activities of camping and fishing are also social and community activities for the purposes of s 237(a), but they occur off the licence.

Activities located outside the licence area

[34] The State highlights that Walalakoo describe activities which occur in areas outside of the licence area. Depending on the circumstances, it is possible for community or social activities outside a licence to be affected by activities related to the grant of a licence. As noted in *Yindjibarndi Aboriginal Corporation v FMG* at [59], ‘There needs to be quantifiable evidence before the Tribunal of ongoing community and social activities on, or having a nexus with, the relevant area in order to assess whether there is a real risk of those activities being adversely affected by the exploration activities if the grant is made’.

[35] The State asserts that, while it is possible for an outside area to be relevant for community or social activities, a sufficient nexus has not been shown in this instance. In relation to the State’s points about main camp and Geegully Creek being outside the licence area, Nyikina Mangala People state, in their reply, that the ‘close geographical proximity’ of the licence to Geegully Creek and Clanmyra Pool support their contention that the nexus has been established.

[36] The evidence in the present inquiry is sufficient to conclude that social and community activities are conducted within the licence. Even though the Nyikina Mangala People do not camp directly on the licence, given that the licence is so close to Clanmyra Pool and that pool contains year round water, I regard it as reasonable to conclude Nyikina Mangala People do traverse the proposed licence, particularly in the south east area of it, to conduct their intergenerational teaching, hunting and gathering activities. As to whether exploration activities within the licence may affect social or community activities off the licence, but near to the licence, I address this in more detail below.

(ii) *What activities do Kallenia Mines' intend to undertake on the licence?*

- [37] Kallenia Mines' contentions do not clearly identify the specific activities it intends to undertake on the licence area, though the supporting material, such as a report from a Consultant Geologist, provides some information. This material suggests Kallenia Mines will initially survey the area and, depending on how prospective it is, will drill a series of mining holes into the sub-strata for production. This relates to extraction from a salt dome that is, at its shallowest point, approximately 650 metres below the surface. The number and location of such drill holes are not clear. There is evidence that water flows into that sub-strata. Kallenia Mines states extraction is said to 'be accomplished by "solution mining" – that is by boring drill holes to the "salt dome" and pumping water solutions into this horizon and pumping the heavy brine back to storage facilities on the surface'. It is not clear where or what type of storage facilities there will be. The information provided suggests the mineral which Kallenia Mines is exploring for extends across the entire width of the proposed licence (from the adjacent tenement, E04/1998, held by Mr Richmond).
- [38] Kallenia Mines have also included a document titled, 'Statement in support of application for exploration licence [at Frome Rocks #2] W R Richmond [on behalf of Kallenia Mines Pty Ltd]' (with annotations by Mr Richmond). One page details information about an exploration program. Some of the text is typed and some (including the only reference to E04/2428) are handwritten additions. The document appears incomplete and it does not appear authoritative. Nonetheless, I note the document states the program is designed to delineate and locate gold, base metals and any other valuable commodity and consists of data research/geological mapping and drilling of suitable targets in the second stage of evaluation, and that there is a minimum expenditure per year of \$20,000.
- [39] Kallenia Mines has included what appears to be an extract of a report about Frome Rocks Project (author unknown and purpose and content of the report unknown), with a map. Kallenia Mines have highlighted and annotated that 'Two seismic surveys have been conducted over the application' and there is an arrow showing the 'location of E04/2428'. Mr Richmond states that while it is allowed under the grant to remove up to 1,000 tonnes of material, this is not applicable, though he does not explain why.

[40] In their reply, the Nyikina Mangala People assert that Kallenia Mines' information about proposed activities is not detailed and does not explain the activities proposed over the life of the tenement, and maintain that the presumption of full exercise of rights should apply.

[41] I agree there is little information from Kallenia Mines and the failure to provide targeted, specific contentions is not helpful. As stated in *Ward v Western Australia* at [26], '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'.

[42] As the Tribunal held in [*Silver v Northern Territory*](#), a common sense predictive assessment approach is required. This may be summarised as considering 'the legal regime under which the grantee party will operate, and also, as an integral part of the predictive assessment, consider the likely exercise of the rights available, based on the evidence presented' (at [28]). Mr Richmond has provided some very scattered and broad information about the intentions of Kallenia Mines and how it will exercise the rights available to it on grant.

[43] While I take that information into account in my decision making, I have not given it a great deal of weight as it is so disparate, and also unsworn. I consider it is likely Kallenia Mines may utilise the full suite of rights available to it under s 66 of the *Mining Act 1978* (WA), including the right to extract up to 1,000 tonnes of material from the licence once granted.

(iii) *Is there likely to be direct interference with any community or social activities?*

[44] The level of interference with community and social activities can be of a small group or a collective experience, though it must be substantial rather than trivial (see *Yindjibarndi Aboriginal Corporation v FMG* at [16]).

[45] The State has accepted the Yirraman Project involves intergenerational teaching and the licence area is used as part of the project. However, the State considers the evidence insufficient in terms of Yirraman Project activities on the licence area, or even at main camp, and that there is no evidence Yirraman Project activities or other intergenerational

activities would be interfered with by the presence of strangers flowing from the licence grant.

- [46] The State notes some intergenerational activities occur around main camp, and argue that Nyikina Mangala have not shown that the activities could not simply continue in the non-licence part of the determination area. However, I think the point is not whether the activities can occur on other parts of the determination area, but whether such activities on the licence are likely to be interfered with by the exploration activities of Kallenia Mines.

Relevance of tenure on or near the licence area

- [47] Tenure and current and past access to the area are relevant to the question of whether the grant of the licence would directly and substantially interfere with any community or social activities. The State's tenograph plan notes there is a current exploration licence held by Mr Richmond (E04/1998), which overlaps 50 per cent of the proposed licence area, as well as a number of previous exploration tenements that overlapped the licence to varying degrees.
- [48] There is an existing heritage agreement involving Mr Richmond covering E04/1998, and it has been addressed in correspondence and discussions between Mr Richmond and KRED (representing Walalakoo in relation to that tenement). Kallenia Mines proposed for the subject licence E04/2428 to be covered by that agreement and the Nyikina Mangala People declined (as is clear from an email dated 13 April 2017 from Mr Richmond to Kimberley Land Council in Kallenia Mines' supporting material). There is an email from Mr Richmond to the Tribunal dated 24 September 2015 advising that former tenement E04/2358 (covering the same area as E04/2428) could only be rolled into the E04/1998 agreement if Walalakoo Aboriginal Corporation took an assignment of rights, and noted Walalakoo Aboriginal Corporation were not a party to the E04/1998 agreement. Nyikina Mangala People contend any past interference with social and community activities is less likely to have occurred in that E04/1998 area due to the existence of that agreement and the fact that the native title holders themselves managed the impact on those activities.

[49] As is noted by the State, there is no evidence of the content of the agreement. I do not have the terms of the agreement before me to confirm the parties or the nature of the heritage protection, so I am not assisted in considering how such an offer from Kallenia Mines affects the subject licence. I find there is little information which leads me to conclude the area has been substantially interfered with.

Location

[50] The Nyikina Mangala People have asserted that their evidence, including the nearby Aboriginal communities ‘establishes that various members of the native title holding community access the tenement area frequently throughout the year’, which increases the likelihood of direct interference. They further contend the proximity of Aboriginal communities to the licence indicates the licence is used more frequently than other areas further away (referring to *Forrest v Gooniyandi* at [43] among other authorities).

[51] The State contend direct interference is unlikely. In particular, I note their contentions about the location of activities. Overall, the State have asserted that although activities do occur within the proposed licence, they occur in the licence area to a lesser extent than they occur outside the licence area (particularly main camp).

(iv) Conclusion in relation to s 237(a)

[52] As noted above, up to 1,000 tonnes of material could be removed from the area upon grant of the licence. It has also been indicated that Kallenia Mines might drill to at least 650 metres depth, and build and use storage facilities on the licence. Kallenia Mines asserts interference is not likely as it will enter the licence from the west, that is, from Mr Richmond’s existing tenement. I note interference that may appear trivial to a person not a member of a native title party, may be substantial having regard to the native title party’s traditions (see *FMG v Yindjibarndi* at [75]–[79]). I believe this matter is one to which these circumstances apply.

[53] The Nyikina Mangala People have established that they undertake hunting, gathering and intergenerational teaching on the licence. They have also established the licence is an important area for these activities because of its proximity to Aboriginal communities, Clanmyra Pool and Geegully Creek. As such, I accept there is an intensity of activity that is likely to be interfered with by exploration activities of Kallenia Mines.

That is, I find Kallenia Mines' proposed exploration activities are likely to directly and substantially interfere with the Nyikina Mangala People's hunting, gathering and intergenerational teaching social and community activities conducted on and near the licence. On this basis, I determine the expedited procedure does not apply.

[54] I note I do not, however, find it likely Kallenia Mines' exploration activities would interfere with the Nyikina Mangala People's fishing activities, as these would be restricted to Clanmyra Pool and Geegully Creek, which is off the licence. I also find camping activities, which appear to occur substantially at main camp not on the licence, are unlikely to be interfered with. Whether or not drilling into the sub strata would affect the water in the area is something for which evidence has not been lead.

(b) Is there a real risk of interference with sites or areas of particular significance to the Nyikina Mangala People (s 237(b))?

[55] The issue the Tribunal is required to determine in relation to s 237(b) is whether there is likely to be (in the sense of a real risk) interference with areas or sites of particular (that is, more than ordinary) significance to the native title party in accordance with their traditions. For an area or site to be of 'particular significance' it needs to be of special or more than ordinary significance to the native title holders (see *Cheinmora v Striker Resources* at 34–35). It needs to be known, able to be located and the nature of its significance explained (see *Silver v Northern Territory* at [91]). If there is evidence that areas or sites of particular significance exist on a licence, I must proceed to consider whether interference is likely. If there is no such evidence, I do not need to undertake this next step of the inquiry (*Yindjibarndi Aboriginal Corporation v FMG* at [17] and [125]).

(i) Are there any sites or areas of particular significance to the Nyikina Mangala People on the licence?

[56] The State and Kallenia Mines have produced extracts from the Department of Aboriginal Affairs' heritage database showing there are no registered sites nor other heritage places within the licence area. The Nyikina Mangala People assert there are various sites or areas of particular significance within the licence area.

[57] For the reasons below, and after considering all of the evidence produced, I have no doubt that Clanmyra Pool and Geegully Creek (the portion associated with Clanmyra Pool that is near the licence) are of particular significance to the Nyikina Mangala People.

Geegully Creek, Fitzroy River and tributaries

[58] The Nyikina Mangala People state the Fitzroy River, and its tributaries (one of which is Geegully Creek), are of ‘great significance to the [Nyikina Mangala People] particularly in relation to the Rainbow Serpent narrative’.

[59] They also state the Geegully Creek area’s importance is demonstrated by its inclusion on the National Heritage List under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). They state that the list contains a place called ‘The West Kimberley’ which part of the licence area falls within and they describe the ‘National Heritage listed values for the Tenement Area’. They have produced an excerpt from the West Kimberley Place report which describes the Fitzroy River. The State acknowledges Geegully Creek is on the National Heritage List, though they note it does not intersect within the licence area. The State also notes neither Fitzroy River nor its tributaries are within the proposed licence, and notes that the National Heritage Listed area overlaps the licence area by 0.6 per cent, as is shown in the tengraph plan.

[60] The Nyikina Mangala People contend there is ‘water that flows underneath the ground in the Tenement Area, which is connected to the fresh water pools and the Dreamings...’ which ‘have been identified in the description of the West Kimberley national heritage place for their cultural value’. Ms Milgin states:

32. In that area where the *ungur*, living water is you have to talk to the spirit and the serpent you have to talk to them and tell them that you area [sic] here.

...

36. I am concerned that the tenement area might be on top of where the water flows underneath the ground. We need to have a look at that and do a heritage clearance in the area before people go there.

[61] The State’s view is that there is no evidence that such underground water exists and emphasise Ms Milgin’s language that there ‘*might*’ be that water. I believe there is insufficient evidence to confirm the extent to which water flows under the licence or the consequences of such.

[62] The Nyikina Mangala People contend there would be a real chance of interference from the grant of the licence ‘given the extremely significant nature of the Fitzroy River and its tributaries, as demonstrated by the evidence in the Milgin affidavit and confirmed by the National Heritage values associated with the Fitzroy River’. They contend this includes that part of the National Heritage Place which is overlapped by the licence.

[63] The Nyikina Mangala People state the spirit of the country recognises people for ‘Geegully Creek Country’ and refer to the importance of being introduced to country. Ms Milgin’s affidavit refers to *Kallenmai*, also known as Clanmyra Pool. For example:

21. That area is a very special place, it is important. You have spirit in that country that recognise you there.

...

32. In that area where the *ungur*, living water is you have to talk to the spirit and the serpent you have to talk to them and tell them that you area here.

...

37. Any time that we come to that place we talk to those spirits to let them know that we have people that have never been to that place before and we talk to those spirits and ask them to look after those people.

38. To introduce strangers to Kallenmai [*Kalanmayi/Clanmyra Pool*] I’d take the stranger there take the rock and rub it under their arms and throw it in the pool so that no harm comes to them.

39. The spirit is still in that area and that’s why we are careful there. We have to do the right thing by talking to the spirit and introducing ourselves.

40. If you are a stranger to that country and you go there something bad might happen to you. There is a story about something that happened to a stranger in that area. I don’t want to say more about it but bad things can happen when strangers go to that place.

[64] Regarding Ms Milgin’s references in paragraph 37–40 to ‘that place’, ‘that area’ and ‘that country’, it is not clear what particular area(s) she is speaking about. The preceding paragraphs 36 refers to the licence area, so paragraphs 37–40 could be read as following on from that. Paragraph 38 refers to ‘the pool’, which I interpret to mean the pools in Geegully Creek outside the licence area, such as Clanmyra Pool. I accept that Clanmyra Pool and the portion of Geegully Creek that is associated with Clanmyra Pool near the licence, are sites or areas of particular significance, notwithstanding the fact that they are not located on the licence.

Area associated with the Bugarigara (Dreaming Story)

[65] The Nyikina Mangala People explain Ms Milgin tells the Buragigara (dreaming story), and the two fresh water pools in Geegully Creek, one being Clanmyra Pool, are named in this story which is one of the main dreaming stories for Nyikina Mangala Country. Ms Milgin explains the story in her affidavit. Nyikina Mangala state the role of certain narratives associated with this dreaming is reflected in the values included on the National Heritage List. Ms Milgin explains the importance of protecting Geegully Creek and the fresh water pools:

We were taught to protect it and if we can't protect it we could get sick for not protecting the sites and the places where *Wunyambu* and the other Bugarigara creatures are moving across our land. As elders we have to speak for our country and stop any destruction of our sites. The elders like my dad told us that.

[66] In regards to the location of this site, the State asserts the story and associated sites lie outside the licence area and no evidence or explanation has been given as to how it is related to the licence or would be affected by the grant of the licence. I find there is insufficient evidence for me to conclude the dreaming story or sites associated with the story are within the licence. Nor is there sufficient evidence to conclude the nexus between the licence, the dreaming story and the sites associated with the story is such that the sites themselves would be affected by the activities of Kallenia Mines.

Area associated with the falling star dreaming story

[67] The Nyikina Mangala People and Ms Milgin describe the falling star dreaming story connected to the Geegully Creek/*Kalanmayi* (Clanmyra Pool) area. The Nyikina Mangala People have reiterated they have responsibilities to protect the underground flowing water because it is connected with the fresh water pools, the spirit and the serpent. The State outline that the dreaming story site does not overlap with any part of the licence and there is no evidence to demonstrate a nexus. In the absence of a nexus, they contend interference is unlikely.

[68] I find there is insufficient evidence for me to conclude the dreaming story or sites associated with the story are within the licence. Nor is there sufficient evidence to conclude the nexus between the licence, the dreaming story and the sites associated with the story is such that the sites themselves would be affected by the activities of Kallenia Mines.

Camping and trading area

[69] The Nyikina Mangala People explain there is a site for old people for camping and trading purposes, located at the main camp, where many ‘artefacts and mens stuff’ has been found. Ms Milgin’s affidavit states:

Old people used to camp on the side of the river where the tenement area is and they used to camp on the other side as well. Old people when they used to camp they used to leave their stuff there. Like artefacts and mens stuff. On the other side of the river we found a lot of artefacts and mens stuff.

In that area where the tenement is people used to come from other places like Yawuru side and they used to have ceremonies. Items that were traded like boomerang, grinding rocks, shells. It could be that artefacts and items like that are in the tenement area. We want to check whether those things left by the old people are in the tenement area.

[70] Ms Milgin’s description of old people having camped in the past on both sides of the river and leaving things there does not describe when that occurred. She refers to ‘in that area where the tenement area is’, but the possibility of artefacts and similar items are described in an uncertain manner, and she expresses the desire to check whether such artefacts are in the licence area. The State assert that main camp is outside the licence area and no nexus has been demonstrated. I find there is insufficient evidence for me to conclude such artefacts or gender specific materials exist on the licence, thus the particular significance has not been established.

Birthplaces

[71] The Nyikina Mangala People contend there are birthplaces of Ms Milgin’s father and grandfather, which ‘have significance to the [native title party] and contribute to Ms Milgin’s feelings of connection to this area’. Soon after referring to the licence area, Ms Milgin states (at 7–8):

My two grandfathers were born in that area, lived and worked in that area all their lives.

My dad been born in *Mayankada* which is in that area along Geegully Creek going back towards the Fitzroy River.

[72] Having considered Ms Milgin’s evidence, I accept these birthplaces are located on or near the licence area, though the precise location is not established. Ms Milgin has not expanded on these birthplaces so I do not have an explanation of their particular significance. I consider the particular significance of these birthplaces to the native title party has not been established.

(ii) *Is there likely to be interference with any areas or sites of particular significance?*

[73] Having found that the Geegully Creek portion near the licence and Clanmyra Pool are sites or areas of particular significance, I now address whether grant of the licence is likely to cause interference under s 237(b). As I found earlier in this decision, Kallenia Mines' exploration activities, including strangers accessing the licence area, are likely to cause direct and substantial interference with social and community activities of the Nyikina Mangala People, due largely to the significance of these nearby locations. For the reasons below, I am not convinced, however, that exploration activities on the licence would interfere with the sites of the Geegully Creek portion or Clanmyra Pool.

Third parties on country

[74] The Nyikina Mangala People have stated it is not appropriate under traditional law and custom for third parties to access the licence area unless required cultural protocols are followed. They explain that if strangers were to enter the area without permission and without following ceremonial rituals, this would likely result in interference for the purposes of s 237(b). Ms Milgin's affidavit describes the practice associated with introducing strangers to Clanmyra Pool, so that no harm comes to them, and talking to and introducing themselves to the spirits and asking for the spirits to look after the new people.

[75] The State acknowledge that, in limited circumstances and depending on the evidence, entering an area without permission of the traditional owners can constitute s 237(b) interference, but they assert the evidence provided in this matter does not establish this for the licence area. The evidence about Clanmyra Pool above (the falling star dreaming story) relates to an area outside the licence. They also state there is no evidence there are sites or areas on the licence area with restricted access under traditional law and custom. Regarding strangers asking permission before entering the native title party's country, they state that 'a native title party, by asserting that they expect, or would prefer, to be negotiated with by a mining company which wishes to access land, cannot thereby exercise a virtual veto over whether the expedited procedure can ever be attracted to exploration activity'. My understanding of the Nyikina Mangala People's material differs slightly, in that I interpret many of the requirements are between the traditional owners and spirits, rather than the traditional owners and mining company,

and that has been addressed in my analysis of the social and community activities analysis earlier in this decision.

- [76] As stated earlier, due to the location of the sites of particular significance, I believe the evidence about third parties and permission is of lesser relevance for s 237(b) purposes, and goes more to the question of interference with community of social activities, already dealt with above.

The State's regulatory regime and conditions on the grant

- [77] The State intend to place a Regional Standard Heritage Agreement (RSHA) condition on the proposed grant of the licence, which would propose an agreement between the State, grantee party and the native title party is entered into in relation to heritage protection. The Nyikina Mangala People assert they have developed their own heritage protection agreement for their particular needs over their determination area. They do not endorse the State's RSHA and contend any RSHA condition for grant should be given no weight. As the RSHA condition requires consent from the native title party to be operative, and the Nyikina Mangala People have not accepted it, it will have no effect and therefore will not diminish any potential for interference with any sites or areas of particular significance.

- [78] The State notes a number of other endorsements and conditions will be attached to the proposed grant, including standard conditions for environmental rehabilitation and environmental approval being required before ground-disturbing activities are carried out. The State also notes the *Aboriginal Heritage Act 1972 (WA)* is operative and, in the absence of evidence to the contrary, the Tribunal should assume a grantee party will not act in breach of the relevant statute, regulations or conditions imposed.

(iii) Conclusion in relation to s 237(b)

- [79] Regardless of the State's regulatory regime or imposed conditions on the grant of the licence, I find it is not likely sites of particular significance will be interfered with, as such sites are not located on the licence. That is, Kallenia Mines will not physically be on those sites and a sufficient nexus between the licence and the sites off the licence has not been established in that context, notwithstanding the issue of interference with water flowing through the licence. There simply was insufficient evidence on that point.

(c) Is the grant of the licence likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance (s 237(c))?

[80] Walalakoo do not provide contentions or evidence in relation to s 237(c). As stated in *Ward v Western Australia* at [26], ‘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’. Based on the limited information before me, I find the grant of the licence is not likely to involve major disturbance to the land or waters concerned.

Determination

[81] The grant of exploration licence E04/2428 to Kallenia Mines is not an act attracting the expedited procedure.

**Helen Shurven
Member
1 September 2017**