NATIONAL NATIVE TITLE TRIBUNAL

Dolores Cheinmora & Others on behalf of the Balanggarra Native Title Claimants/Heron Resources Ltd/Western Australia **[2005] NNTTA 99 (22 December 2005)**

Application No: WO05/9

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

-and-

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

Dolores Cheinmora & Others on behalf of the Balanggarra Native Title Claimants - WC99/47 (native title party)

-and-

The State of Western Australia (Government party)

-and-

Heron Resources Ltd (grantee party)

DETERMINATION THAT THE ACTS ARE ACTS ATTRACTING THE EXPEDITED PROCEDURE

Tribunal:	Mr Daniel O'Dea, Tribunal Member
Place:	Perth
Date:	22 December 2005

Catchwords:	Native title – future act – proposed grant of exploration licences - expedited procedure objection application – whether acts directly interfere with community or social activities – whether acts interfere with areas or sites of particular significance – whether there is a likelihood of major disturbance to land or waters – presumption of regularity – acts that attract the expedited procedure.
Legislation:	*Native Title Act* 1993 (Cth), ss 29, 24, 31, 148(a), 150, 151, 203BB(1)(b), 203BC(1)(b) and (2), 237(a), (b) and (c) *Mining Act* 1978 (WA), ss 8, 20(5), 24(7) and 63 *Aboriginal Affairs Planning Authority Act* 1972 s 31 *Aboriginal Affairs Planning Authority Regulations* Reg 8(3) *Aboriginal Heritage Act* 1972 (WA), ss 5, 17 and 18 *Mining Act 1904* (WA) s 276

Cases:	*Walley v Western Australia* [2002] NNTTA 24; (2002) 169 FLR 437
	Silver v Northern Territory of Australia [2002] NNTTA 18; (2002) 169 FLR 1
	Irruntyju-Papulankutja Community/Western Australia/ Broadmeadow Pty Ltd, NNTT WO95/7, Paul Seaman QC (6 October 1995)
	Chienmora v Striker (1996) 142 ALR 21
	Dolores Cheinmora & Ors (Gwini, Walmbi and Wunnubal Peoples)/Western Australia/Striker Resources NL, NNTT WO96/41, Pamela O'Neil (28 August 1996)
	Palmer Gordon Ngalpil/Western Australia/Glengarry Mining NL, NNTT WO96/49, NNTTA 44, Hon C J Sumner (2 October 1996)
	Paddy Neowarra & Others (Wanjina Wunggurr Willinggin Native Title Claimant Group/Western Australia/ Garry Evan Same, NNTT WO01/461, NNTTA 157, Hon C J Sumner (2 August 2002)
	Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd, [2003] NNTTA 62 (9 April 2003), J Sosso
	Dora Sharpe and Others on behalf of the Gooniyandi native title claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western Australia, [2004] NNTTA 31 (7 May 2004), D O'Dea
	Smith v Western Australia (2001) FCA 19
	Western Australia/Winnie McHenry on behalf of the Noongar People [1996] NNTTA 210, Hon EM Franklyn QC (28 July 1999)
	Little and Others on behalf of the Badimia People v Oriole Resources Pty Ltd [2005] FCAFC 243 (5 December 2005)
	Banjo Wurrunmurra and Others on behalf of Bunuba Native title Claimants; Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/ Bernfried Gunter Wasse, James Ian Stewart, Paul Winston Askins, [2005] NNTTA 90 (2 December 2005) Hon CJ Sumner
Representative for the Native Title party:	Ms Sonya Kilkenny, Kimberley Land Council
Representative for the Government party:	Ms Karen Dougall, State Solicitor's Office Mr Greg Abbott, Department of Industry and Resources
Representative for the Grantee party:	Mr Mathew Longworth, Heron Resources Ltd

REASONS FOR DETERMINATION

Background

[1] On 6 October 2004, the Government party gave notice under s 29 of the *Native Title Act* 1993 (Cth) ('the Act') of its intention to grant exploration licences E80/2951 and E80/2953 ('the proposed licences') to Heron Resources Ltd ('the grantee party') and included in the notice a statement that it considered that the grant attracted the expedited procedure, that is, one that can be done without the normal negotiation required by s 31 of the Act.

[2] On 17 January 2005, Dolores Cheinmora and Others on behalf of the Balanggarra Native Title Claimants ('the native title party') (WC95/30 – registered from 29 July 1995 to 10 December 2004) lodged with the Tribunal an objection to the statement that the grant of the proposed licences attracted the expedited procedure. The application for the determination of native title by the Balanggarra claimants was subsequently combined into WC99/47, the Balanggarra (Combination) application, and the resulting claimant group was placed on the Register of Native Title Claims from 9 December 2004.

[3] The objection application was accepted by the Tribunal on 3 February 2005. On 11 May 2005 an officer from the Kimberley Land Council ('KLC') confirmed with the Tribunal in writing that the claim number associated with the objection application was more correctly WC99/47. Notwithstanding this confusion, I am satisfied that the Balanggarra native title party has continually remained on the Register of Native Title Claims since 29 July 1995 and is therefore entitled to the procedural rights available to it under Part 2, Division 3, Subdivision P of the Act.

[4] The proposed licences are entirely overlapped by the combined claim of the native title party. The areas and locations of the proposed licences are as follows:

- E80/2951 – 238.59 square kilometres, 193 kilometres north westerly of Wyndham in the Shire of Wyndham and East Kimberley;

- E80/2953 – 232.14 square kilometres, 194 kilometres north westerly of Wyndham in the Shire of Wyndham and East Kimberley.

Relevant Facts

[5] The objection application sets out at paragraph 7 the reasons why the native title party believes the grant of the proposed licences are not acts attracting the expedited procedure:

a) the Balanggarra claimants have a spiritual connection with the entire area subject to the proposed licences and use the land for hunting and gathering, as well as accessing it to attend to sites. These are activities which will be curtailed by the use of exploration and drilling equipment. Flora and fauna will be destroyed or scared away and sites may be affected, impacting on the community's conduct on, and enjoyment of, country;

b) the grant of the proposed licences and subsequent access to the land by the grantee party prior to discussion with elders is against the customary law and beliefs of the Balanggarra claimants;

c) elders very often are not able to read, write or interpret maps, making it impossible for permission for access to be granted to the proposed licence holders until their intentions are clarified and the exact area of land affected is known;

d) unrecorded artefact scatters requiring identification by specialists have been left by the Balanggarra claimants' ancestors in the area of the proposed licences. Unless first identified, recorded and protected, the very act of driving across country to the proposed licence areas, as well as the exploration activity itself, is likely to destroy them; and

e) rights under the *Mining Act* 1978 (WA) created by the grant of the proposed licences will, when exercised, involve major disturbance, including the drilling of holes and excavation of 1000 tonnes of material from the land.

[6] At paragraph 8 of the objection application, the native title party asserts that it intends to provide affidavit and oral evidence of a historical, anthropological, archaeological, genealogical and linguistic nature relevant to s 237(a) and (b) of the Act and affidavit and oral evidence of an environmental nature relevant to s 237(c) of the Act. The native title party further requested that oral evidence be given on country. However, at a Listing Hearing convened on 17 November 2005, all the parties agreed that the matter should proceed to a determination 'on the papers'.

Directions and terms of Inquiry

[7] On 3 February 2005 the Tribunal issued Directions for the lodgement by each party of their respective contentions and the provision of other documents and material to be relied upon by them. These Directions provided for a 16 weeks period from the objection closing date in which parties could attempt to reach agreement over any of the issues concerning the

native title party. They required compliance by the Government party by 30 May 2005, the native title party by 7 June 2005 and the grantee party by 13 June 2005. Initial directions were amended on two subsequent occasions to permit further negotiation, including Tribunal assistance by way of mediation pursuant to s 150 of the Act, but by August 2005 it became apparent that parties had reached an impasse and the concurrent mediation was terminated for failure to reach agreement. A further two requests to extend the period for compliance with directions were agreed by all parties, the final dates for compliance being set at 7 November 2005 for the native title party and 14 November 2005 for the grantee party. At my invitation, and with the consent of the other parties, an additional submission was provided by the native title party on 1 December 2005.

[8] I am satisfied that I can adequately deal with this matter on the basis of the documents before me.

Legal issues

[9] The term 'act attracting the expedited procedure' is defined in s 237 of the Act as a future act which:

a) is not likely to interfere directly with the carrying on of the community or social activities of the native title party;

b) is not likely to interfere with areas or sites of particular significance, in accordance with the traditions of the native title party; and

c) is not likely to involve major disturbances to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

Material Provided by the State

[10] The Government party contends that the proposed licences will not give rise to any of the issues raised by s 237(a), (b) and (c) of the Act because there are no Aboriginal communities within or in the vicinity of proposed licence E80/2951 and the communities of Carson River and Kalumburu are located four kilometres east and north, respectively, of E80/2953. Further, proposed licence E80/2951 is situated entirely on Reserve 21675, which is Aboriginal Reserve Land pursuant to Part III of the *Aboriginal Affairs Planning Authority Act* 1972 (AAPA Act) vested in the Aboriginal Lands Trust ('ALT') for the use and benefit of Aboriginal inhabitants. The land comprising E80/2953 falls within the same Reserve

21675 to the extent of 38%. Section 24(7) of the *Mining Act* 1978 provides that mining (which includes fossicking, prospecting and exploring for minerals, as well as mining operations, as defined at s 8 of the Mining Act) is subject to the written consent of the Minister for State Development, and before that consent is given the Minister must consult with the Minister for Indigenous Affairs, who administers the ALT. In practice, upon receipt of such a request from the Minister for Indigenous Affairs, the ALT will seek the advice of the relevant affected Aboriginal community. If the Aboriginal community has reached an agreement with the relevant mining company they will advise the ALT to recommend to the Minister that he advise the Minister of State Development that he should provide the requisite consent pursuant to s 24. In addition, the Government party contends that pursuant to s 31 of the AAPA Act and Regulation 8 of *Aboriginal Affairs Planning Authority Regulations* (AAPA regulations) the grantee party must obtain a permit from the Minister for Indigenous Affairs before accessing land subject to Part III of the AAPA Act. In practice, the Government party advises that the Minister for Indigenous Affairs requires an agreement between the relevant Aboriginal community and the grantee party before such access can be granted, and such an agreement would form the basis for the formulation of conditions to be attached to that permit. Further, while the Minister for Indigenous Affairs may grant permission for access at the Minister's discretion, if the Minister's decision differs in any material way from the views expressed to the Minister by the ALT, the Minister must provide reasons to the ALT and lay them before both Houses of Parliament as soon as practicable (Reg 8(3)). It should also be noted that these requirements will also apply to that part of E80/2953 that falls with Reserve 21675.

[11] The Government party also refers to the provisions of s 20(5) of the *Mining Act* in relation to the 59.5% of E80/2953 that is overlapped by Carson River pastoral lease (PL 3114/1056), and s 63 of the *Mining Act* which prescribes the conditions to be imposed on the grant of the proposed licences. In the case of E80/2951 the Government party appends a copy of the conditions and endorsements applicable to its grant, and it is apparent that the condition addresses the requirement for written consent to be provided before mining activities commence on the Reserve 21675. Endorsement 2 also suggests that an area of land subject to E80/2512 will be excised from E80/2951, if granted; however the Department of Industry and Resources' Quick Appraisal reveals that E80/2512 was forfeited on 25 June 2004 and I infer that this endorsement no longer applies. In relation to E80/2953, the standard conditions and endorsements applicable to all exploration licences in Western Australia are said to apply and additional conditions provide for notification to the pastoral

lessee of certain exploration activities, a requirement for written consent from the Minister before mining may be undertaken in the Reserve area, and restrictions on mining activities in the vicinity of a Geodetic Survey Station. A further endorsement in relation to the grant of E80/2953 provides for liaison with the Department of Conservation and Land Management with respect to the rainforest areas and rainforest monitoring sites.

[12] The Register of Aboriginal Sites held by the Department of Indigenous Affairs ('DIA') evidences no registered sites within the boundaries of E80/2951, and three registered sites within or overlapping E80/2953, as follows:

- Site ID 12534 – Milyungi, said to be a mythological, man made structure
- Site ID 14744 – King Edward River, painting
- Site ID 14745 – Paruri, said to be a mythological site and a quarry

All three sites are on the permanent register and Paruri is listed as closed access. The Government party relies upon ss 5, 17 and 18 of the *Aboriginal Heritage Act* 1972 (WA) ('the AHA') which go to protecting Aboriginal areas or sites. Further, an endorsement drawing the grantee party's attention to those provisions is included in the conditions of grant for each of the proposed licences.

[13] The area of the proposed licences has previously been subject to limited exploration. Four exploration licences and two temporary reserves (titles similar to exploration licences granted pursuant to s 276 of the *Mining Act* 1904 (WA)) covering the area the subject of this Inquiry having been active for periods between 1968 and 1998. A further eight exploration licence applications were withdrawn prior to grant.

Material provided by the Grantee

[14] The grantee party provided a statement of contentions and the affidavit of Norman Mathew Longworth, affirmed 16 November 2005. The thrust of the grantee party's argument is that it has 'accepted the base agreement proposed by the native title party' (para 5 – Longworth affidavit) and that in so doing has addressed all the concerns raised in native title party's evidence in relation to consultation and heritage protection. Norman Mathew Longforth, a director of the grantee party, deposes to the effect that 'The grantee party is prepared to enter into an agreement with the native title party on the terms proposed in the annexed agreement' (para 6). The annexed agreement is a document, annotated with deletions and additions, which are commonly exchanged between negotiating parties. As I understand it, the grantee party is stating its preparedness to enter into an agreement which

would consist of the terms set out in the document as it stands. This agreement addresses, inter alia, such issues as exploration protocols, environmental protection and rehabilitation of the land, access rights of the Balanggarra claimants and heritage protection and work clearance protocols.

Material Provided by the Native Title Party

[15] The native title party submitted the affidavits of Margaret Antonia Maraltadj, affirmed 7 October 2005, and Pauline Mae Unghango, affirmed 19 October 2005, and they are set out below in full.

[16] Affidavit of Margaret Antonia Maraltadj:

> 'I, Margaret Antonia Maraltadj of Coral Close, Lakeside, Kununurra in the State of Western Australia, solemnly and sincerely declare and affirm THAT:
>
> 1. My name is Margaret Antonia Maraltadj.
> 2. I am an active member of the Balanggarra native title applicant group. My husband is a named applicant on the Balanggarra native title application and deputy chair of the Balanggarra Aboriginal Corporation. I belong to the *Kwini* tribe which is a subgroup of the Balanggarra native title group. I still speak and understand the *Kwini* language.
> 3. I have seen a map of the two areas where Heron Resources Ltd has applied to explore. The southern most of these two groups is in *Kwini* country. I am connected to this country through my grandfather on my mother's side. Because of my close connection to the area, I was nominated to speak for that country at a full claim group meeting of the Balanggarra native title applicants. I know the area where the northernmost exploration area is too but it's not my country so I can't speak for it.
> 4. The southern area Heron Resources Ltd has applied to explore on is land which belongs to the Balanggarra people and, in particular, to the *Kwini* tribe. In my language, we call this area is *Wunjural*. This is the name for the area white people call Mt Leeming area. The name *Wunjural* doesn't just cover that Mt Leeming, but it covers the whole area, including the whole of the southern exploration area. *Wunjural* country runs to as far north as Paradise Pool and to as far south as Koondili Creek.
> 5. I have been to *Wunjural* country many, many times, ever since I was a little girl. In the old days, I went to *Wunjural* country with my grandfather and other family members. A (sic) night, around the campfire, my grandfather would tell me and the others family members lots of stories about our country including stories from the dreamtime.
> 6. *Wunjural* country is still a special place for me. I still go to that country with my own family now. It is part of my traditional responsibilities to look after that country. Some time I do that by visiting the country by myself or with my family. Other times, I have been involved in heritage clearances for that area with other mining companies to make sure they don't disturb any special areas.
> 7. Because of my experience with other mining companies, I am aware of the types of activities which the grantee party could perform under the terms of the exploration licence, if granted.
>
> **Interference with community and social life**
>
> 8. I go onto *Wunjural* country regularly with my family. We go there camping and fishing. There are still many good camp sites and fishing spots on that country, especially along the rivers. I like to take my kids out to that country during the school holidays so they get to know that country and learn about the old ways.

9. The *Wunjural* area has lots of good bush food but, in particular, it is known to be special for the big red kangaroos. We call them *ambarr*. There are heaps of them in that area. My family have been hunting them many times. They make a good feed.

10. The *Wunjural* area also has lots of bush turkey (*bannarr*), goanna (*karialli*) and freshwater turtle (*purnai*). You can also get bush honey which we call *warnarr*, yams and bush potatoes (*mangannda*) from that area. Ever since I was a little girl, my family and I have been getting bush foods from that area.

11. You can also get lily root (*mienii*) in the rivers in *Wunjural* country. We get that lily root and then crush it up and use it to make pancakes. It's just like white man's flour. There's a special grass that grows in that area too but only in one season. You can use that grass to make flour too. I have seen that grass growing there in that country many times.

Interference with sites of particular significance

12. I used to go to *Wunjural* country with my mum and dad and all the elders, including my grandfather. I was told that the country was my grandfather's country. When we were camping out on that country I was told lots of stories about the country but especially I was told how I had responsibility to look after that country after my grandfather passed on. My grandfather is gone now and so my family and I have a special responsibility for that country.

13. In the *Wunjural* area there are lots of sites that are special for me and my people. There are some meeting sites for the old people. There are some rock art sites and lots of burial sites. I know that there are some sites that are for men only but I can't say anything more about them because that's not my business.

14. It would be bad for me and my people if someone from the mining company went to some of these sites, like the burial sites or the men's sites, even if they went there by accident. The mining company people need to have a guide to go on that country so that don't go to places where they shouldn't go.

15. Last year, one of the mining companies required a heritage clearance done on the area of country similar to the southern most exploration area of this application. I went out in a helicopter with my three daughters and we flew over all the country to check to see where it was okay for the mining company to access and where they shouldn't be going. My husband went out on a 12 day trip in the helicopter, with that same mining company to make sure that the mining company only went to the right places. I wasn't able to go on that trip but my husband told me about it.

Major disturbance to land or waters

16. In the old days, strangers had to ask permission before they could walk on our country. My grandfather told me that if people didn't ask permission and they came on the country, they would be killed. That's the truth. If people asked permission to come onto the country, they would be given a guide to make sure they only went to the right places.

17. If we make an agreement with mining people, we tell them where they can go on our country or send one of our people with them as a guide. That way, we know that none of our special places will be disturbed. It's the way things were done in the old days and I think we should do the same thing with the mining companies nowadays if they want to come onto our country.'

[17] Affidavit of Pauline Mae Unghango:

'I, Pauline Mae Unghango, of 15B Greybox Crescent, Kununurra in the State of Western Australia, solemnly and sincerely declare and affirm THAT:

1. My name is Pauline Mae Unghango. I was born on the 26th February 1952.

2. I am an active member of the Balanggarra native title applicant group. I belong to the *Diba* tribe which is a subgroup of the Balanggarra native title group. My people are called the *Argulanorr*, or devil people. My family name is actually *Wungangu*, from my father, but we were given the name 'Unghango'. My Aboriginal name is *Laburrben*, which is the wings from the devil, the noise it makes when it flies.

3. I have seen a map of the two areas where Heron Resources Ltd has applied to explore. I am connected to both areas that the exploration company wants to look around on through my father. I belong to that country. Because of my close connections to the area, I was nominated to speak for that country at a full claim group meeting of the Balanggarra native title applicants.

4. The southern area Heron Resources Ltd has applied to explore on is land which belongs to the Balanggarra People. We call the Mt Leeming area *Wunjural*, which is my father's aunty *Manawala's* name. The northern area that follows Carson River is also an important area. I have travelled through all of this country with my father. It is important for us to go and look at the area properly, because it is hard to tell where on the country the exact boundaries of the maps are.

5. I go out visiting that country with my own family now. It is part of my responsibility to look after that country. When you go onto our country you have to talk to the old people. When we take out our young people we introduce them to the country and to their ancestors. The spirits of our ancestors are still on the country. If strangers don't get introduced to the country by the right people from that country, our ancestors come out. They wonder what they are doing and watch them. Sometimes strangers get attacked by these spirits, I have known this to happen.

6. One time I went out fishing at this one spot with all the kids, looking for *purnai* or freshwater turtle. All the kids jumped straight into the water. I was out there for three days trying to get *purnai* but I caught nothing. I couldn't believe it. Usually when you fish for turtle it is right there. Then I realised that I had not introduced the kids to the country and our old people. Some of the kids had not been out to Carson before and the country did not know them. That is why I never caught any *purnai* that trip.

Interference with community and social life

7. I go on to Carson River with my family for camping, fishing, hunting and looking for bush tucker. My people have been on that country all the time. You can still find spears, digging sticks, and other things from our old people, especially along the rivers. Sometimes the kids dig up all these things up from the old people. That northern exploration area runs right along where things from our old people have been found, close up to the river.

8. We have plenty of bush foods in Carson River. There are some places that are particularly good for hunting, fishing and collecting bush food. These areas are important to us as they provide our food supply. We teach our young about these places. We need to look after the places that are good for bush tucker. It is hard to tell properly from the maps but it looks as through there are such areas for bush foods in or close up to both the northern and southern tenement.

9. Our country has a lot of bush foods, such as kangarro (*ambarr*), goanna (*karialli*), turkey (*bannarr*), freshwater crocodile (*goya*), and freshwater turtle *(purnai*). In the rain season, we have green and black fruits, like what *gardiya* (or white man) call bush plum. The black plum was call *kularni*, the green *kerlai*, and there is one that is also green when ripe *karndala*, when they fall down from the tree they turn black. When they turn black, you can mash it up and dry it out properly. You then wrap it up in paperbark and can carry it around – like today's dried fruits. When you want to eat it, you mix it up with gum (*kuma*) from that tree with red flowers. You can also eat the nuts from that tree also. These are just some of the bush foods that we rely on.

10. We have always used *arnkooroo* or ironwood for smoking. This is used all over, by many different people in the Kimberley and further, for this reason. When someone passes away, a

few weeks after if they passed away in a house, we smoke that house. This will clean the area out. At birth too we use this tree. We smoke babies to make them strong – their ears so they won't hear bad things, their eyes so they can see clearly and so they won't see bad things, their legs so they are strong and so they won't go the wrong way and so on. It is also used for women, for their *ngarmoo*, to help give them milk, and also when people are sick. There are some places where there is a lot of this type of tress growing. These places should be respected. It is good to leave those trees alone.

Interference with sites of particular significance

11. There is a *lai lai*, or dreamtime place that I have only been told about that is somewhere on or close to the northern tenement area. I only know the general area that it is in, because I have not been there yet. My father, Hector, told me for that place. My old people (Dolly and Cyril) know exactly where that place is. This *lai lai* is a special place of stones. When the stones are standing up it represents family who are still alive. The stones that are lying down represent family members that have passed away. Little stones represent the young people coming up – when a new baby is born, another stone will come up. This is a very important place.

12. In the southern area there is a burial site in a cave that I know of. The bones are wrapped up in paperbark. My brother has seen that place and those bones. I can't be sure that there are no more such places within the exploration area until I have been out there. It is too hard to tell from the map.

13. There are places on our country that people can't go to. This mining company should respect this and work with us. Our country can be dangerous.

Major disturbance to land or waters

14. If the mining companies want to go to our country they should respect our ways. Proper way people should get introduced to the country is by Traditional Owners. That is the way it has always been.'

[18] Both Ms Maraltadj and Ms Unghango depose to be active members of the Balanggarra native title applicant group. Ms Maraltadj deposes that her husband is one of the persons jointly comprising the applicant for the Balanggarra native title determination, as well as being the deputy chair of the Balanggarra Aboriginal Corporation. I note that one Clement Maraltadj is listed as a named applicant for WC99/47 and infer that this person may be Ms Maraltadj's husband. In any event, both deponents assert that because of their close connections with the subject areas they have been nominated to speak for that country during a Balanggarra claim group meeting. On the basis of the statements contained in the affidavits, I am satisfied that each of the deponents has the requisite authority to speak on behalf of the claimant group as a whole and properly reflect the traditions and knowledge of the claimant group concerning the area of the proposed licences.

[19] The native title party has also filed a statement of contentions with the Tribunal (4 November 2005) and, at my invitation, an additional statement addressing the Government party's contentions in relation to access to reserve lands (1 December 2005). I have read and considered this material and will refer to it during the course of the reasoning that follows.

Legal Principles

[20] In *Walley v Western Australia* [2002] NNTTA 24; (2002) 169 FLR 437 (‘*Walley*’) the Deputy President, the Hon CJ Sumner, considered the applicable legal principles in relation to s 237 (paragraph [7-23]). These matters have also been further discussed by Member Sosso in *Silver v Northern Territory of Australia* [2002] NNTTA 18; (2002) 169 FLR 1 (‘*Silver*’). I accept the enunciation of the relevant legal principles in those matters for the purposes of this determination.

Findings in relation to E80/2951

[21] The Tribunal has previously found that the regulatory regime applicable to Aboriginal Reserve land subject to Part III of the AAPA Act is such that an exploration licence is unlikely to cause the interference or disturbance referred to in s 237 of the Act (*Irruntyju-Papulankutja Community/Western Australia/Broadmeadow Pty Ltd*, NNTT WO95/7, Paul Seaman QC, 6 October 1995; *Chienmora v Striker* (1996) 142 ALR 21**;** *Dolores Cheinmora & Ors (Gwini, Walmbi and Wunnubal Peoples)/Western Australia/Striker Resources NL*, NNTT WO96/41, Pamela O’Neil, 28 August 1996; *Palmer Gordon Ngalpil/Western Australia/Glengarry Mining NL*, NNTT WO96/49, NNTTA 44, Hon C J Sumner, (2 October 1996); *Paddy Neowarra & Others (Wanjina Wunggurr Willinggin Native Title Claimant Group/Western Australia/ Garry Evan Same***,** NNTT WO01/461, NNTTA 157, Hon C J Sumner, (2 August 2002) (‘*Same*’)). The regulatory regime has been outlined above (at para [10]) and is described comprehensively in *Same* (at [11]-[12]).

[22] It is apparent from the additional submission provided by the native title party that the process for consultation with the affected Aboriginal community and the ALT is subject to a Memorandum of Understanding (‘MOU’) between the DIA, the KLC and the ALT. The native title party asserts that under the process agreed by the MOU, the Minister for Indigenous Affairs (via DIA) contacts the grantee party to suggest that they consult directly with the KLC to obtain written consent to the granting of an entry permit. The native title party’s additional statement sets out the relevant provision of the heritage protection agreement which for the purposes of the MOU constitute consent:

> ‘3. ENTRY PERMITS AND GRANT OF TENEMENTS ON ABORIGINAL RESERVES
>
> 3.1 Within fourteen (14) days of request in writing by the Company, KLC agrees on behalf of the Traditional Owners of the Land, subject to the terms of this Agreement, to recommend to the Minister:-

(a) that the Minister should issue Entry Permits to the Company and to the Company's contractors and personnel as nominated from time to time by the Company for the purpose of carrying out Exploration within the Reserve. Entry Permits are to be applied for annually for the duration of the Company's Exploration program for that year;

(b) that the Minister for Mines grant any application for a Tenement on land within the Reserve and consent to Exploration on that land for the purpose of Section 24 of the Mining Act.

3.2 KLC will have no obligation to make a recommendation in accordance with cause 3.1(a) or 3.1(b) if, at that particular time, the Company has committed a material breach of any fundamental term or condition under this Agreement and that breach has been notified to the Company and the breach has not been remedied to the extent it is capable of remedy.'

[23] The submission continues with the assertion that the grantee party's work programme must be submitted to the native title party in accordance with heritage protocols outlined in the heritage protection agreement, and that this work programme is assessed by 'amongst others, the relevant community members of the native title party who may be affected by the proposed exploration works'. I infer from this statement that at least some community members are also members of the Balanggarra native title party and therefore consultation with the native title party must occur before permission to access the subject area is approved. The KLC represents the Balanggarra claimants, the native title party in this matter, and I find that unlike the situation described in *Palmer Gordon Ngalpil*, the community members consulted would comprise a significant number of persons who are members of the Balanggarra claimant group. Indeed, the focus of the KLC consultation process is likely to be the Balanggarra claimant group rather than any particular community.

[24] In concluding, the KLC, on behalf of the native title party, observes that in practice 'the Minister has not ever granted access to Balanggarra Reserve Lands in the absence of ALT consent and a signed HPA'. I accept this statement and adopt the findings of the Tribunal in *Same* (at [13]) in finding it likely that exploration on Reserve 21675 will be permitted only if an appropriate agreement with the native title party is in place. I accept that permission to enter the Reserve will not be granted by them unless the issues of concern have been satisfactorily dealt with and appropriate conditions imposed. The Minister for State Development is unlikely to consent to mining until the Minister for Indigenous Affairs has authorised access to the exploration licence area. I therefore conclude that, because of the existence of this regulatory regime, it is not likely that any of the three limbs of s 237 are likely to be offended in relation to E80/2951 or that part of E80/2953 that falls within Reserve 21675.

Findings in relation to E80/2953

[25] Had the entire area of land the subject of E80/2953 been within Reserve 21675, I would have found, as above, that the expedited procedure is attracted because permission to enter the area would not be granted until the grantee had entered into a suitable heritage protection agreement sufficient to make it not likely that the requisite interference would occur. However, the larger southern portion of E80/2953 is pastoral leasehold so I must now consider the contentions and evidence before making a finding.

Community or social activities (s 237(a))

[26] The Tribunal must consider the likelihood of activities occurring which will directly interfere with the carrying on of community or social activities of the persons who are holders of the native title. Ms Maraltadj and Ms Unghango both depose to the carrying on of such activities by Balanggarra people. In reaching my conclusions I have referred not only to the sections of the affidavits clearly designed to specifically address s 237(a) but to the content of the entire affidavit, given that there appears to be material relevant to the various limbs of s 237 scattered throughout the affidavits.

[27] The contentions of the native title party relevant to this limb of s 237(a) are as follows:

a) the grant of the tenements without consultation with the native title party, and even the presence of the grantee party on the tenement, is likely to cause spiritual and emotional distress to claimants in addition to interfering physically with community and social activities, (paragraphs 13-17);

b) members of the Balanggarra claimant group belong to the country affected by the grant of the proposed licences and have a responsibility to look after that country. They live, camp, hunt, gather and teach their children about their culture within and close to the subject area, and conduct Law ceremonies and look after sites of significance within the same area (paragraph 18);

c) exploration activity will disrupt hunting, fishing and gathering activities by scaring away wildlife and rendering it unsafe to discharge firearms or hunt by other means (paragraph 20);

d) the area the subject of the proposed licences is used ‘frequently’ by members of the Balanggarra claimant group because the land is well suited to camping, fishing, hunting and gathering of bush tucker and medicines, it is close to a

> number of (unspecified) communities and is, partially, encompassed by Aboriginal Reserve 21675. It contains law grounds and areas of significance (paragraph 21);

[28] The affidavit evidence of Ms Maraltadj appears to be largely directed towards the area of E80/2953, which she says is located in the area known as *Wunjural*, or Mt Leeming. Ms Maraltadj does not depose to live on or near the proposed licence, but rather at Kununurra, which is at least 250 kilometres distant. However, she asserts a close connection to the subject area through her maternal grandfather and identifies as part of the Kwini tribe, whose country the tenement occupies. The *Wunjural* area is described as extending north to 'Paradise Pool' and south to 'Koondili Creek'. At my request the KLC has provided an annotated map broadly depicting those parameters as including the entire area of E80/2953. Further additional information from the KLC describes Paradise Pool as being 'located adjacent to the top of southern tenement E80/2953', which I take to mean alongside but not within the tenement boundaries, and 'Coondillah Creek' is depicted on Tribunal mapping as being approximately eight kilometres south of the same tenement. I infer that Coondillah Creek and Koondili Creek are one and the same and accept that the *Wunjural* area encompasses the entire tenement area and immediate vicinity. I further note that the location of Paradise Pool would therefore necessarily be within Reserve 21675.

[29] Ms Maraltadj deposes that she has visited the *Wunjural* area 'many times' with her family, both as a child, and more recently in carrying out her obligation to look after the country, including conducting heritage clearances with mining companies. She also indicates that educative visits with her children take place during school holidays and that when visiting the country Ms Maraltadj and her family camp, hunt and gather, particularly along the rivers. Some detail is then provided as to the flora and fauna accessible in the area. I observe that the King Edward River runs through the proposed licence in a generally northerly direction and that the Carson River joins the former from a south easterly direction at a point central to the tenement.

[30] Ms Unghango also deposes to live in Kununurra while having close connections with both proposed licences through her father. She supplements Ms Maraltadj's evidence with detailed information about the bush foods available in both areas and the traditional methods of preparation of those foods for both ritual and consumption. It is apparent from the deposition that social and community activities such as camping, hunting fishing and educative visits continue today, and that the Carson River (and by inference, Carson River

pastoral lease which is Indigenous owned) area, in particular, is 'important to us as they provide our food supply', although no specific information as to the frequency of these activities is provided.

[31] I note that both affidavits indicate that the entire area is relatively rich in bush foods and that Ms Unghango admits that 'it is hard to tell where on the country the exact boundaries of the map are'. The area of E80/2953 overlaps only a small portion of Carson River pastoral lease (in the south west) and the Carson River itself flows from a considerable distance south of the proposed licence along the Carson Escarpment. Further, the area comprising the combined Balanggarra claim extends far to the south and east of the proposed licences. In *Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd*, [2003] NNTTA 62 (9 April 2003), J Sosso (at [43]-[44]) Member Sosso considered that the wide extent of country in which social and community activities were carried out led to a finding that they were not likely to be directly affected by exploration activities associated with the grant of a single licence.

[32] Both the affidavit of Ms Maraltadj and Ms Unghango would have been a much more probative had they been more explicit as to the frequency and exact location of their visits to the area the subject of the proposed exploration licences. However, given that both deponents express such a broad knowledge of the area, because comments are made in the present tense and because they corroborate each others focus on the *Wunjural* area which is clearly partly within the relevant non Reserve area of E80/2953, I am prepared to infer that hunting, fishing, camping, gathering and educative activities continue to be carried on today within the area the subject of the proposed E80/2951 and that such activities are capable of being characterised as community and social activities.

[33] The native title party contends that community and social activities can have spiritual dimension, citing in support of this contention *Walley* at [13]-[21] in which Deputy President Sumner considered the differing views of Tribunal members in relation to this issue. I have considered this contention in a previous inquiry (*Dora Sharpe and Others on behalf of the Gooniyandi native title claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western Australia*, [2004] NNTTA 31 (7 May 2004) (at [29])) and I agree with the position of Deputy President Sumner at [14] in *Walley*, concurring with the views of Sosso in *Silver*, to the effect that any spiritual dimension to community and social activities must be rooted in those activities. In any event, the physical activities identified in the evidence are sufficient in this case to establish their existence for consideration in terms of the likelihood of interference.

[34] The next issue that I must determine is whether, in the circumstances, the activities of the grantee party under the terms of its exploration licences are not likely to directly interfere with those community and social activities. The test to be applied here is the 'real risk' test identified in *Smith v Western Australia* [2001] FCA 19 at [23]-[25] and adopted in *Silver* (at [92]). The Tribunal has also held that the existence of prior mining or pastoral activities which have in the past or which currently affect the native title parties' community or social activities may be taken into account in assessing whether the grant of an exploration tenement is likely to further affect such activities (*Smith v Western Australia* [2001] FCA 19; (2001) 108 FCR 442 at [26]-[28]; *Walley* at [12]).

[35] As previously identified, Government party documentation provides evidence of limited exploration activity in the region. I note that the pastoral lease overlapping the larger southern portion of E80/2953 is Indigenous owned and can infer that pastoral activities would be carried out in a culturally sensitive way so as to avoid unnecessary interference.

[36] Both deponents speak of the need for the grantee party to consult with the native title party in accordance with their traditions to ensure that 'special places' will not be disturbed and that strangers are introduced to country 'right way' by traditional owners. The grantee party has indicated its willingness to enter the agreement annexed to the Longworth affidavit. My conclusion on this limb of s 237 is based on three fundamental considerations. Firstly, although there is helpful evidence as to the conduct of current community and social activities within the general area of the proposed licence E80/2953, it lacks any real specificity in relation to the relevant area, particularly that which is outside Reserve 21675. Secondly, the fact that the grantee party will not be able to access that part of E80/2953 within Reserve 21675 without the sort of access agreement described above. Thirdly, the uncontested fact that the grantee party has indicated a willingness to enter into an agreement that it claims addresses the concerns of the native title party. Notably, the native title party did not dispute this point or take issue with appropriateness of the agreement. In these circumstances, I find that it is not likely that the grant of E80/2953 will interfere with the community or social activities of the native title party.

Sites of particular significance (s 237(b))

[37] Section 237(b) of the Act requires that the site or area be one of special or more than ordinary significance in accordance with the tradition of the native title holders (*Chienmora v Striker* (1996) 142 ALR 21 at 34-35). The particularity of the significance of areas and or

sites must be capable of identification and established by the evidence of the native title party (*Western Australia/Winnie McHenry on behalf of the Noongar People* [1996] NNTTA 210, Hon EM Franklyn QC (28 July 1999) (WO98/125). In considering whether such sites or areas exist in the area and whether the grant of the E80/2953 is likely to interfere with these areas or sites I have referred to the affidavits from Ms Maraltadj and Ms Unghango on behalf of the native title party and Mr Longworth's affidavit. I have also taken into account the contentions filed by the parties.

[38] The native title party contends that:

a) the proposed tenements are located in a site rich area, both in terms of sites registered with DIA and those mythological, cultural and traditionally significant areas identified in native title party affidavit evidence (paragraphs 24-28);

b) there are practical difficulties for a grantee party who seeks to avoid sites of significance if consultation with traditional owners does not occur (paragraph 29);

c) the definition of the areas to which the AHA applies is more restrictive than the terms of s 237(b) of the Act, therefore it cannot be automatically assumed that the legislative protection afforded is sufficient (para 30-31);

d) the mechanisms of the AHA allow exploration activities which may breach s 17 of the AHA if the relevant Minister gives consent to such activities, but without native title party consultation (paragraphs 32-33); and

e) the provisions of the AHA are merely brought to the grantee party's attention upon grant of the licences, providing inadequate reassurance that sites and areas of significance would be protected (paragraph 37).

[39] DIA Site Register information provided by the Government party indicates that there are three recorded sites in the area of the E80/2953. However, the Register provides a far from exhaustive record of all Aboriginal sites in the Kimberley region, nor indeed throughout Western Australia, and the provisions of the Act apply whether or not a site is officially recorded as such. On the other hand, the presence of a site on the area the subject of the proposed licences, recorded or otherwise, does not establish that the site is of particular significance to the native title party.

[40] Ms Maraltadj's affidavit attests to the importance of the area known as *Wunjural*, a 'special place for me and my people, situated in the area the subject of proposed E80/2953 (para 6). Ms Maraltadj speaks of 'meeting sites' for old people, rock art sites and burial sites, and other sites the locations of which are known to men only (para 13). Ms Unghango attests that there is a 'burial site in a cave' on E80/2953, and suggests that it would not be possible to tell if there are more such sites without visiting the country (para 12). The three sites registered with DIA also appear to lie within the *Wunjural* area and I am satisfied that there would certainly be a number of sites of significance to the native title party within this area.

[41] Mrs Maraltadj's evidence makes no reference to any specific place within the area of the proposed E80/2953 which she asserts is of particular significance. She clearly believes that there are places within the proposed area which are of some significance to her and other members of the native tile party, including burial sites, rock art locations, meeting places and men's sites. She cannot speak of these men's sites and I have no further evidence from any male member of the native title party which might assist. I do not doubt that according to traditional law the whole area is of great importance to her but for the purposes of s 237(b) of the Act there is crucial distinction between an individuals special responsibility under traditional law to look after country that is theirs in accordance with that law and those areas within that country which are sites of particular cultural, religious, ceremonial or historical significance to them and the native title party as a whole.

[42] Ms Unghango deposes to knowledge of the existence of a burial site in a cave where the bones are wrapped in paperbark (para 12). The basis for her assertion is that her brother has seen the site. She further asserts that she cannot be sure if there are other such areas within the proposed are of E80/2953 until she has been out on the land as the maps are inadequate.

[43] In matters of this nature, there must be evidence of sufficient specificity to found a conclusion that there are areas of particular significance to the native title party located within the proposed area. I contrast the evidence adduced in this matter with that which underlay the findings in other matters in areas within the same region (*Dora Sharpe and Others on behalf of the Gooniyandi native title claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western Australia*, [2004] NNTTA 31 (6 May 2004) D O'Dea) and *Banjo Wurunmurra and others on behalf of Bunuba Native title Claimants; Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Bernfried Gunter Wasse, James Ian Stewart, Paul Winston Askins*, [2005] NNTTA 90 (2 December 2005) Hon C J Sumner).

In those matters, there was evidence of sites, where the significance was attested to, and some, albeit limited, elaboration of that significance provided. In this matter the evidence before me does not disclose a sufficient basis to conclude that there are areas of particular significance to the native title party with the area of the proposed E80/2953. This is so, even though both affidavits make reference to unnamed persons who may well have the capacity to provide the requisite information.

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

[44] Section 237(c) of the act requires a predictive assessment of whether the act of granting the proposed licences or the exploration activities undertaken upon grant of the licences are likely to involve major disturbance, the meaning of which was considered recently by the Full Court of the Federal Court in *Little and Ors on behalf of the Badimia People/Oriole Resources Pty Ltd* [2005] FCAFC 243 (5 December 2005). The Full Court held that the Tribunal must assess the likelihood of major disturbance occurring on the basis of what is likely to be done rather than what could be done. What is likely to be done will be determined on the facts. The Tribunal must determine whether major disturbance is likely to occur from the viewpoint of the entire Australian community, including the Aboriginal community, as well as taking into account the concerns of the native title party.

[45] The native title party contends that major disturbance would be likely to occur as a result of the activities permitted by the grant of exploration licences, and lists those potentially damaging activities as being reverse circulation drilling in areas of hypersaline ground water, core drilling and the creation of drill holes, excavation of up to 1000 tonnes of material and creation of infrastructure associated with exploration activities. The native title party also considers that the mere presence of unauthorised persons on the subject area will result in major disturbance because traditional law and custom requires that strangers be introduced and receive permission to enter country and those who do not may become sick or injured or may even be killed. This contention is supported by the affidavit evidence of Ms Maraltadj (paragraph 15-17) and Ms Unghango (paragraph 13 and 14). Ms Unghango deposes that ‘our country can be dangerous’ and reinforces the need for introduction by relating a story about the time she did not catch any *purnai* (freshwater turtle) because she had forgotten to introduce family members to country. However, while I accept that the presence of strangers on the subject area may be upsetting to the Aboriginal community and may even result in repercussions for both the community and the grantee party, it is clear that

the grantee party has shown a willingness to enter into an agreement providing for consultation with the native title party.

[46] Mr Longworth, a director of the grantee party, has sworn that the grantee party is prepared to enter into the agreement annexed to his affidavit (para 6). That agreement includes provisions relating to environmental rehabilitation, heritage protection and work clearance protocols. I further note that the Grantee will be unable to access that portion of E80/2953 that falls within Reserve 21675 without compliance with the relevant processes discussed above. In these circumstances I find that it is not likely that the grant of E80/2953 will cause major disturbance to the land or waters concerned.

Determination

[47] The determination of the Tribunal is that the grant of exploration licences E80/2951 and E80/2953 to Heron Resources Ltd are acts which attract the expedited procedure.

Daniel O'Dea
Member
22 December 2005