

**NATIONAL NATIVE TITLE TRIBUNAL**

*Walalakoo Aboriginal Corporation RNTBC v William Robert Richmond and Another* [2015] NNTTA 48 (23 October 2015)

**Application No:** WO2015/0020

**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 (native title party)**

- and -

**The State of Western Australia (Government party)**

- and -

**William Robert Richmond (grantee party)**

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

**Tribunal:** Ms H Shurven, Member  
**Place:** Perth  
**Date:** 23 October 2015

**Catchwords:** Native title – future act – proposed grant of exploration licence – expedited procedure objection application – nexus – social or community activities outside licence - whether act likely to interfere directly with the carrying on of community or social activities – whether act likely to interfere with sites or areas of particular significance – area or site of particular significance located outside the proposed licence – adjacent – whether act likely to cause major disturbance to land or waters – expedited procedure not attracted

**Representatives of the native title party:** Ms Julia Smith and Mr Rob Houston, KRED Enterprises Ltd

**Representatives of the Government party:** Ms Sarah Power, State Solicitor’s Office  
Ms Bethany Conway, Department of Mines & Petroleum

**Representative of the grantee party:** Mr William Richmond (self-represented)

**Legislation:** [Mining Act 1978 \(WA\)](#) s 66  
[Mining Regulations 1981](#) (WA) r 20  
[Native Title Act 1993 \(Cth\)](#) ss 31, 32, 150, 237

**Cases:**

*Balanggarra Aboriginal Corporation Registered Native Title Body Corporate v Bar Resources* [\[2014\] NNTTA 62](#) ('Balanggarra Aboriginal Corporation v Bar Resources')

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

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

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

*Smith v Western Australia* [\[2001\] FCA 19](#); (2001) 108 FCR 442 ('Smith v Western Australia')

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

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

*Western Australia v Ward* (1996) 70 FCR 265; [\[1996\] FCA 1879](#) ('WA v Ward')

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

## REASONS FOR DETERMINATION

### Introduction

- [1] The Tribunal must decide whether the State of Western Australia can grant exploration licence E04/2358 to William Robert Richmond, a sole explorer, using a fast-tracking process known as the ‘expedited procedure’. Mr Richmond wishes to explore for minerals in an area of land which is approximately 102 kilometres south of Derby in the Kimberley, Western Australia, and approximately 13 square kilometres in size. The native title party, Walalakoo Aboriginal Corporation, hold exclusive native title rights and interests over an area of land inclusive of the E04/2358 licence (see *Nyikina Mangala v State of Western Australia*). The native title rights and interests are held by Walalakoo Aboriginal Corporation on behalf of the Nyikina Mangala People.
- [2] If the expedited process applies, the State can grant the licence without the State or Mr Richmond needing to negotiate with the Walalakoo Aboriginal Corporation about the grant. Mr Richmond and the State assert the expedited procedure does apply. The Walalakoo Aboriginal Corporation assert the expedited procedure does not apply. The Walalakoo Aboriginal Corporation put forward this view by lodging an objection application with the National Native Title Tribunal. The licence cannot be granted while there is an unresolved objection. The objection can be finalised if, for instance, parties reach agreement and the native title party withdraws the objection. Or the Tribunal can make a decision through an arbitral inquiry as to whether or not the expedited procedure applies (see s 32 *Native Title Act 1993* (Cth) (the Act)). As no agreement has been made between parties, and the objection remains on foot, I am proceeding to make the arbitral decision in this matter as required by the legislation. I was appointed by the Tribunal’s President, Raelene Webb QC, to make that decision.
- [3] I must consider whether the grant of the licence is likely to: interfere with the Walalakoo Aboriginal Corporation’s community or social activities; interfere with areas or sites of particular significance; and involve major disturbance to relevant land or waters. If all of those three factors are answered in the negative, then the expedited procedure applies and Mr Richmond and the State do not need to negotiate with the Walalakoo Aboriginal Corporation (see ss 32 and 237 of the Act). If any one or more of those factors is answered in the affirmative, then the negotiation parties will need to enter into good faith negotiations about grant of the licence (see ss 31 and 32(5) of the Act).

[4] All parties were content for the decision to be made based on written materials they provided, including two maps prepared by Tribunal Geospatial Services, and no party requested a hearing. I am satisfied the matter can be determined using the written materials.

[5] I will address the following issues in this decision to determine whether or not the expedited procedure should apply to the grant, as required by s 237 of the Act:

- a) Is the grant likely to interfere directly with the carrying on of the community or social activities of the Nyikina Mangala?
  - i. What are Nyikina Mangala's community or social activities?
  - ii. What are Mr Richmond's proposed activities?
  - iii. Will the activities of Mr Richmond be likely to interfere with the Nyikina Mangala community or social activities?
- b) Will the grant be likely to interfere with areas or sites of particular significance to the Nyikina Mangala?
  - i. Are there any sites of particular significance?
  - ii. Will the activities of Mr Richmond on the licence interfere with sites of particular significance?
- c) Will the grant be likely to involve major disturbance or create rights whose exercise is likely to involve major disturbance to any land or waters concerned?

[6] All parties submitted a statement of contentions and supporting evidence to the Tribunal, putting forward their views about the above issues. The Walalakoo Aboriginal Corporation also submitted an affidavit of a senior Nyikina Mangala person, Mrs Annie Milgin, who lives in the Jarlmadangah Aboriginal community near E04/2358 (approximately 35 kilometres north east of the licence). Mrs Milgin states she accesses the licence via Sandfly Station track which is close to her community. She has been chosen by the Walalakoo Aboriginal Corporation to speak for the country in the licence area. I am satisfied Mrs Milgin has authority to speak for the Walalakoo Aboriginal Corporation. When describing events on behalf of the native title party, Mrs Milgin speaks about Nyikina Mangala people; I note these references are relevant to my decision as the Nyikina Mangala claim is related to and precedes the determination held by the Walalakoo Aboriginal Corporation.

[7] To provide context to the determination, the nature of the exclusive native title rights and interests held by the Walalakoo Aboriginal Corporation, as listed on the Tribunal's National Native Title Register, are as follows:

Exclusive native title rights and interests

5. Subject to paragraphs 7, 8 and 9 the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule Three, being areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded, are:
- (a) except in relation to flowing and underground waters, the right to possession, occupation, use and enjoyment of that part of the Determination Area to the exclusion of all others; and
  - (b) in relation to flowing and underground waters, the right to use and enjoy the flowing and underground waters, including:
    - (i) the right to hunt on, fish from, take, use, share and exchange the natural resources of the flowing and underground waters for personal, domestic, cultural or non-commercial communal purposes;
    - (ii) the right to take, use, share and exchange the flowing and underground waters for personal, domestic, cultural or non-commercial communal purposes.
- ...
7. The native title rights and interests referred to in paragraphs 5(b)...do not confer:
- (a) possession, occupation, use and enjoyment of those parts of the Determination Area on the Native Title Holders to the exclusion of all others; nor
  - (b) a right to control the access of others to the land or waters of those parts of the Determination Area.
8. Notwithstanding anything in this Determination there are no native title rights and interests in the Determination Area in or in relation to:
- (a) minerals as defined in the Mining Act 1904 (WA) (repealed) and the Mining Act 1978 (WA); or
  - (b) petroleum as defined in the Petroleum Act 1936 (WA) (repealed) and the Petroleum and Geothermal Energy Resources Act 1967 (WA);
  - (c) geothermal energy resources and geothermal energy as defined in the Petroleum and Geothermal Energy Resources Act 1967 (WA); or
  - (d) water lawfully captured by the holders of Other Interests, except the right to take and use ochre to the extent that ochre is not a mineral pursuant to the Mining Act 1904 (WA).
9. Native title rights and interests are subject to and exercisable in accordance with:
- (a) the laws of the State and the Commonwealth, including the common law; and
  - (b) the traditional laws and customs of the Native Title Holders for personal, domestic, cultural and non-commercial communal purposes (including social, religious, spiritual and ceremonial purposes).

**Is the grant likely to interfere directly with the carrying on of the community or social activities of the Nyikina Mangala?**

(i) *What are the Nyikina Mangala's community or social activities?*

[8] The Walalakoo Aboriginal Corporation has provided contentions and evidence that various Nyikina Mangala community and social activities take place in the licence area. I find the activities fall into the categories outlined at [9]-[17] below.

*Hunting and fishing*

- [9] Mrs Milgin describes in her affidavit the licence is very good for hunting because 'the water is close by' (at 13). In terms of water, according to the Tribunal's Geospatial maps, I note the geographical features of both Clanmyra Pool and a portion of Geegully Creek are adjacent to the south eastern border of the licence. The Department of Aboriginal Affairs recorded site of Clanmyra Pool (Site ID 27860) is also in the vicinity of the licence. I outline more on these places later in this decision. The State suggests Clanmyra Pool (presumably the geographical feature) may be within the boundary of the licence. For example, (at 16) it 'is unclear from the maps whether a part of Clanmyra Pool may lie within the proposed tenement area (noting that whether this is the case may depend upon the water level variations during the year)'. For the purposes of this decision, I am content to conclude Clanmyra Pool is adjacent to the licence.
- [10] Mrs Milgin particularly mentions the abundance of goanna and kangaroo and the best time for hunting being the dry season. She says it is a favourite hunting ground for her family, noting the ability to fish nearby and to camp 'along the part of the Geegully Creek near the tenement area' (at 13). Mrs Milgin states she knows of families from Looma hunting there. According to Tribunal mapping, Looma is an Aboriginal community approximately 50 kilometres north east of the licence. The Walalakoo Aboriginal Corporation's contentions state the hunting ground is within the licence.
- [11] In addition to the fishing activity mentioned above, Mrs Milgin describes some special springs where her family and families from Looma go fishing every year. Mrs Milgin's affidavit mentions going fishing and camping 'here' (at 18) but it is not clear whether that is in relation to only the special springs, or also Clanmyra Pool and the part of Geegully Creek adjacent to the licence. Tribunal mapping does not note any springs on the licence, however, that does not mean such springs do not exist, or that 'special springs' may be a reference to Clanmyra Pool or part of Geegully Creek.

*Collecting items (bush medicine and bush foods and products)*

- [12] Mrs Milgin's evidence demonstrates the Nyikina Mangala people collect 'traditional bush medicine' through the seeds of wattle trees (known as Barda Barda, and 'the tenement area is the only place where these trees grow'). The seeds are ground up and used for medicines

and food. She says wattle season is August to November, the seeds are collected every year, and describes the practice of taking old people and children there and her taking the old ladies there last year.

- [13] Mrs Milgin also describes her family and families from Looma loving to collect sugarbag (bush honey) from special paper bark trees which grow all around the E04/2358 area. The Walalakoo Aboriginal Corporation contentions refer to an excerpt from *Forrest v Brockman Exploration* (at [43]) which describe *reliance* on traditional foods and products as not being an activity as such, but indicating the extent to which the native title party used the relevant area for the activities of hunting and gathering. They argue in this current matter, there is evidence of *use* of the trees *and active collection*, as well as active hunting and fishing, and it is not a case of mere reliance. I agree with that assertion.

#### *Camping*

- [14] Mrs Milgin describes camping activities at various points within her evidence; notably that the part of Geegully Creek adjacent to the licence is a beloved spot, close to Walalakoo Aboriginal Corporation's hunting ground within the licence and the Yiriman Project area, a place for workshops for young people, children's health, men and women's groups, each involving week-long camping. Mrs Milgin states her family and people are involved in the Yiriman Project camp at Clanmyra Pool. Mrs Milgin mentions it is the main pool for her family for camping and fishing and they go every year. The Walalakoo Aboriginal Corporation contentions state the camping spots are in the licence and in the immediate surrounding area 'along Geegully Creek near Clanmyra Pool' (at 15), and the evidence demonstrates camping at the part of Geegully Creek adjacent to the licence is due to the existence of hunting grounds within the licence. Thus I conclude any effect on hunting would likely affect camping there.

#### *Caring for country and caring for special places*

- [15] Mrs Milgin describes (at 25) the need to look after places within and in the immediate surrounding licence area including: springs; a creek; and the dreamtime story connected to Clanmyra Pool. She also describes the need to protect these places 'under our law'. My attention for the purposes of s 237(a) is on whether there are specific social or community activities carried out at these places. Mrs Milgin describes Nyikina Mangala rangers

fencing Wiliyalka spring (near Duckhole Pool) to protect it and ensure no one goes there. However, Duckhole Pool appears to be approximately 3.6 kilometres south of the licence. Mrs Milgin describes ‘we take our children and grandchildren’ to Clanmyra Pool to tell them a dreamtime story. The practice of performing a particular activity associated with the Pool is described as a welcome and to let the old people know of their presence.

*Inter-generational teaching*

- [16] Walalakoo Aboriginal Corporation contends the licence and immediate surrounding area are used for knowledge, sharing and teaching. The areas of teaching that Mrs Milgin describes are: teaching children how to make medicines from collected wattle seeds of trees growing only on the licence; taking children and grandchildren to Clanmyra Pool and passing on knowledge about the dreamtime story and the welcome ritual; her father and grandfather teaching her about collecting bush tucker; taking her children and grandchildren across country; teaching children who are in trouble through the Yiriman Project at Clanmyra Pool (involving week-long camping to help the young people and activities as part of a health program); and teaching children about special places close to the licence which have important stories and dreamtime connections.
- [17] After setting out various parts of Mrs Milgin’s evidence, the Walalakoo Aboriginal Corporation contentions state (at 36) ‘it is reasonable to infer that the elder members of the native title party use the Tenement Area to teach younger members the skills of hunting, making and collecting bush medicine, collecting bush tucker and also stories about the Tenement Area which they continue to carry out today during the dry season’.

(ii) *What are Mr Richmond’s proposed exploration activities?*

- [18] The statement in support of the E04/2358 application, received by the State's Department of Mines and Petroleum (DMP) on 4 July 2014 (attachment 1 of Mr Richmond’s material), includes the following information:
- ‘the program has been designed to delineate and locate gold, base metals and any other valuable commodity and thus assesses the mineral potential of the area’;

- the program will consist of ‘data research/geological mapping and drilling of suitable targets in the second stage of evaluation’;
- the initial exploration program will consist of the acquisition of various forms of data and drilling as appropriate;
- Mr Richmond will oversee the exploration programs and engage ‘services of other suitably qualified professionals as required’.

[19] The licence, if granted, will authorise:

- (a) Rights set out in s 66 of the *Mining Act 1978* (WA), which include, subject to various conditions: entering and re-entering the land, exploring by digging pits, trenches and holes, and sinking bores and tunnels, excavating or removing approved amounts of earth, soil, rock, stone, fluid or mineral (up to 1,000 tonnes: see regulation 20 of *Mining Regulations 1981* (WA)) and taking or diverting water from any natural spring, lake, pool or stream;
- (b) Activities as per the conditions and endorsements the State intends to attach to the grant (see Appendix A below);
- (c) Five years of exploration.

[20] The Walalakoo Aboriginal Corporation states Mr Richmond has not provided any specific information to them about how or where he proposes to use the rights of grant. The Walalakoo Aboriginal Corporation has described in detail relationship difficulties between the parties. Mr Richmond’s contentions refer to a willingness to have the licence added to an existing agreement (this agreement is discussed at [32] below). I am mindful that *WA v Ward* established a determination whether the expedited procedure is attracted is to be made as speedily as possible and that, in respect of the determination, it is not the intention of the Act that time should be spent on negotiation. Nevertheless, I also recognise that an exploration licence is granted for some years, and parties may need to have an ongoing relationship to assist the exploration proceed in the most expedient manner possible. Parties did attempt to negotiate mutually agreeable terms, and also had the assistance of the Tribunal under s 150 of the Act, which allows the President of the Tribunal to direct a

conference or conferences to be held to assist parties resolve 'any matter that is relevant to the inquiry'. The s 150 conference process runs parallel to the arbitral process.

- [21] Directions in the arbitral matter were extended on a number of occasions as the prospect of agreement was foreshadowed by parties. Ultimately, parties were unable to agree to terms in a timely manner, and I decided the matter must come to a conclusion through an arbitral decision.

*(iii) Will the exploration activities be likely to interfere with the Nyikina Mangala community or social activities?*

- [22] The State contends (at 18) there is an 'insufficient evidentiary basis for the Tribunal to conclude that substantial interference with the community or social activities of the NTP is "likely"'. The level of interference with community or social activities of a native title party was dealt with in detail in *Silver v Northern Territory* (at [49] and [57]). The interference must be direct and substantial in its impact upon community or social activities, and not trivial. 'The criterion of 'direct' interference is functional rather than definitional. The Tribunal does not have to engage in a semantic cause and effect analysis, rather an evaluative judgment is required that the act is likely to be a proximate cause of the apprehended interference' (*Silver v Northern Territory* at [57] referring to *Smith v Western Australia* at 451).

- [23] That passage was also dealt with extensively in *FMG v Yindjibarndi Aboriginal Corporation* (at [67]-[68]):

[67] As far as the meaning of the word 'interfere' in s 237(b) is concerned, the State also rely on the observations by French J in *Smith* (at [26]) where his Honour said:

The criterion of direct interference in par (a) may be thought of more fruitfully as functional than as definitional. That is to say, it is more usefully regarded as a direction to the Tribunal about its approach to an essentially evaluative judgment than as a definition of a class of consequence which, if attaching to a future act, would take it outside the scope of the expedited procedure. This direction to the Tribunal does not require precise and semantically correct cause and effect analysis in every case. Simple causal analysis in this context would rarely yield a primary cause and effect with no other cause intervening. The notion of direct interference involves rather an evaluative judgment that the act is likely to be a proximate cause of the apprehended interference. And the concept of interference itself is to some degree evaluative. It must be substantial in its impact upon community or social activities. That is to say trivial impacts or impacts which are not relevant to the carrying on of the community or social activities are outside the scope of the kind of interference contemplated by the section. (emphasis added)

[68] Although those observations related to s 237(a) NTA, they would equally apply to s 237(b) NTA. It is clear that the interference must be substantial and must produce an 'impact' of some sort in relation to the activities referred to in s 237(a) NTA.

- [24] The analysis must also be undertaken in the context of the matter. In the present inquiry, Mrs Milgin has provided evidence which suggests Nyikina Mangala people from her community and the Looma community intensively use the licence area, and particularly the south east portion, due to the proximity of geographical features such as Clanmyra Pool and Geegully Creek (in particular that part of the Creek adjacent to the licence). There are no constraints on those activities according to the available evidence, apart from weather variations throughout the year.
- [25] One of the issues relates to the timing of Walalakoo Aboriginal Corporation's activities. Firstly, the State says it is difficult to reconcile Mrs Milgin's statement about the dry season (that is, 'the best time for hunting is during the dry season because during the rain this area is blocked off so we can't get through') with another of her statements that 'we go hunting, collecting seeds and fishing here all the time for all different things during the different seasons'. I do not, however, find these statements to necessarily be contradictory as the dry season statement is in a paragraph speaking about goannas and kangaroos, whereas the 'different seasons' statement is much broader in nature, not specifying which activity out of hunting, collecting seeds and fishing takes place in which of the different seasons. For example, intergenerational teaching is said to take place between May to October (which I understand to be within the dry season), and the wattle season is August to November (the dry season running into the beginning of the wet season, as I understand it). I accept there may be social and community activities such as hunting, gathering and fishing throughout the year, although there is limited detail about those activities in terms of what occurs December to April (traditionally the wet season). Clearly though, if the area is blocked off during the wet season, it may be difficult for Mr Richmond to also access the area during that time, so it is likely he would be accessing the area at the times the Nyikina Mangala people were accessing the area.
- [26] Secondly, the Walalakoo Aboriginal Corporation refers to its seasonal access to the licence area (noting Mrs Milgin's evidence about the area being blocked during the wet season) as an indicator of increased likelihood of Mr Richmond and Walalakoo Aboriginal Corporation needing to use the area at the same time. The Walalakoo Aboriginal Corporation refers to an earlier decision of the Tribunal's (*Balangarra Aboriginal*

*Corporation v Bar Resources* at [48]). In that decision, the Tribunal assumed the explorer could only physically access the tenement area at the same time as the Walalakoo Aboriginal Corporation due to evidence about vehicle access being limited to the dry season. The Tribunal found the likelihood of interference was higher than if access were available all year, or if parties were using the area at different times, or if different routes could be used. In this matter, the evidence about season-based access does suggest a greater likelihood that Mr Richmond and the Walalakoo Aboriginal Corporation would be using the licence at the same time, thus I assume a greater chance of interference than if they were accessing it at different times.

[27] In relation to activities involving that part of Geegully Creek adjacent to the licence, Duckhole Pool, and various waterholes, the State raises that they all lie outside of the licence area. Tribunal mapping indicates: Duckhole Pool is approximately 3.6 kilometres outside the south east boundary; Clanmyra Pool is adjacent to the east boundary; and Geegully Creek runs adjacent to the south eastern side of the licence. The close proximity of Clanmyra Pool and a portion of Geegully Creek to the licence is important to the question of interference with social or community activities, as these areas are associated with camping, hunting and fishing activities, as well as intergenerational teaching. In *Silver v Northern Territory*, the Tribunal held (at [35]) there may be community or social activities carried out which are not in the area of the proposed licence, but which could still be interfered with in the sense contemplated by s 237(a) provided there is a 'clear nexus between those activities and issues being considered under s 237'. As President Webb QC noted (at [59]) in *Yindjibarndi Aboriginal Corporation v FMG*:

...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.

[28] Regarding intergenerational activities, the State notes there is no information about how often the components of the Yiriman Project are run. Speaking generally about Mrs Milgin's evidence under s 237(a), the State contends there is no way for the Tribunal to know how often Mrs Milgin or other members of Walalakoo Aboriginal Corporation's people go to the licence area. It would be helpful to have more detail, however, the evidence demonstrates there are a number of activities which take place, they are held at various times throughout the year, and there are some examples of particular durations of visits, such as the Yiriman Project activities which run for a week at a time.

- [29] The State contends that any exercise of rights will be subject to two types of conditions: the proposed conditions and endorsements (see Appendix A below) and a Regional Standard Heritage Agreement (RSHA) condition.
- [30] A number of the proposed conditions and endorsements relate to the regulation and disturbance of water and water flow on the licence, suggesting that part of Geegully Creek and/or Clanmyra Pool may flow onto the licence at certain times, as there does not appear to be other significant water on the licence according to Tribunal mapping or DMP evidence. The RSHA condition essentially proposes that Mr Richmond would sign a heritage agreement which may be endorsed by peak industry groups if the Walalakoo Aboriginal Corporation requests in writing that such an agreement be entered into. The State contends the proposed RSHA condition is an option for protecting intergenerational teaching from being inhibited. I also note the State suggested Walalakoo Aboriginal Corporation could choose an RSHA from another region. However, the Walalakoo Aboriginal Corporation contends the proposed RSHA condition should not be given any weight, as there is no RSHA agreed for the Kimberley Region, and RSHAs used in other regions are not endorsed by Walalakoo Aboriginal Corporation. In any event, I find the RSHA is more relevant to the issue of interference with sites of particular significance, as it provides little protection for social or community activities.
- [31] The Walalakoo Aboriginal Corporation contends Mr Richmond has not entered into a dialogue about identifying ways the exploration activities could be carried out to minimise interference with Walalakoo Aboriginal Corporation's community life. Also, apart from the program of work submitted at the start of the application process, there is minimal information about what, how and where on the licence Mr Richmond intends to use the rights of grant. To address these relationship issues, the State raises a comment Mr Richmond made in his contentions that 'if the tenement is joint ventured agreement will be made to respect aboriginal rights'. The Walalakoo Aboriginal Corporation contends that Mr Richmond's statement is 'extremely vague' and doesn't offer any concrete protection measures. I note there is no supporting evidence about how Aboriginal rights would be respected in these particular circumstances, and no information about any possible joint venture.
- [32] The State draws attention to an existing agreement involving Mr Richmond and the Nyikina Mangala claim group, referred to as the '2010 agreement' and contends that

interference with activities related to bush medicine will be protected due to circumstances of an existing agreement between those parties. I note the explorer in that agreement was Mr Richmond as well as Kallenia Mines Pty Ltd and it expressly covered three other tenements, with a process for possible inclusion of new tenements. The State notes a clause of the 2010 agreement which allows new tenements to be subject to the agreement with the consent of the traditional owners. Parties had the opportunity to canvass the applicability of that agreement, or transferability of its terms, through the s 150 conference process arranged by the Tribunal as outlined earlier in this determination, and I note agreement was not reached.

- [33] The possible impact of prior and existing mining tenure in the area of E04/2358 on access to the licence, and the ability to carry out native title party activities, is also relevant. The tenement quick appraisal shows various live and expired tenements. Notably, there is an Indigenous held pastoral lease overlapping the licence by 100 per cent, and an exploration permit (EP 457) overlapping by 100 per cent. There is also one live exploration licence (E04/1998) which encroaches the licence in this matter by 50 per cent. This is held by Mr Richmond and is covered by the 2010 agreement. Of the expired tenements, there were exploration permits granted at various points between 1993 and 2013, the last of which ceased in January 2014, many of which overlapped the licence by approximately 50 per cent. However, there have been no submissions or evidence detailing previous exploration, for example, in the south east portion of the licence adjacent to part of Geegully Creek or Clanmyra Pool, to the extent it interfered with the social or community activities of those people constituting the Walalakoo Aboriginal Corporation.
- [34] In this present inquiry, evidence indicates part of Geegully Creek, and Clanmyra Pool, are adjacent to the licence. Evidence also indicates hunting, fishing, camping and intergenerational teaching occur on the licence and particularly on or very near to Clanmyra Pool and the portion of Geegully Creek that is adjacent to the licence. I also conclude that activities relating to the Barda Barda tree occur on the licence as evidence has been given this is the only area in which this tree grows. In relation to the bush honey, it is less clear activities related to its collection and production are isolated only to this licence.
- [35] The Federal Court has determined the Walalakoo Aboriginal Corporation have exclusive native title rights and interests over an area which includes the licence. These rights and

interests allow for 'except in relation to flowing and underground waters, the right to possession, occupation, use and enjoyment of that part of the Determination Area to the exclusion of all others' and also 'the right to hunt on, fish from, take, use, share and exchange the natural resources of the flowing and underground waters for personal, domestic, cultural or non-commercial communal purposes'.

- [36] In addition, evidence has been provided that features in or adjacent to the south east portion of the licence are associated with a dreamtime story which accounts for some of the intensive focus of social and community activities in the area. A clear nexus has been provided with the social and community activities on the licence, and the activities in the areas adjacent to the licence at Clanmyra Pool and the portion of Geegully Creek which abuts the licence. In effect, each of these social or community activities currently occur with little regard for the artificial boundary of an exploration licence.
- [37] There is little information about where the exploration activities are likely to occur. The grant of the licence allows Mr Richmond to exercise rights over any part of the grantable area. The social and community activities evidenced, taken in conjunction with evidence by Mrs Milgin that the area in the south east portion of the licence has special places of significance for the native title holders, suggests this is a hub of social and community activities for the Walalakoo Aboriginal Corporation. If, for example, Mr Richmond's activities were undertaken in the south east portion of the licence, near part of Geegully Creek, or Clanmyra Pool, the activities which Mr Richmond could do under the terms of the grant, including removing 1000 tonnes of material, are likely to substantially and directly interfere with the social or community activities which have been outlined in the evidence provided by the Walalakoo Aboriginal Corporation. There appears to be little within the State's regulatory regime, or in the evidence or contentions of Mr Richmond, which suggest such interference would be mitigated.

**Will the grant be likely to interfere with areas or sites of particular significance to the Nyikina Mangala?**

- [38] As well as an area or site being of special or more than ordinary significance to the native title holders, it must be known and must be able to be located and the nature of its significance

explained to the Tribunal (see *Silver v Northern Territory* and *Western Australia v McHenry*). There must also be a real chance or risk of interference with the area or site.

*i. Are there any sites of particular significance?*

[39] The Walalakoo Aboriginal Corporation has provided contentions and affidavit evidence asserting there are special places either within or in the vicinity of the licence.

[40] The Walalakoo Aboriginal Corporation contentions (at 56) state the ‘south eastern boundary of the Tenement Area and immediate south east surrounding area near and at Clanmyra Pool and part of Geegully Creek, are all areas of particular significance and importance to the NTP in accordance with its traditions...’. Mrs Milgin describes a dreamtime story associated with the south-east side of the licence area and immediate surrounding area and this part of Geegully Creek, and also a rock rubbing and throwing practice that everyone needs to carry out when they go there so they are welcomed back to country and can let the old people know they are there. She also notes (at 18 and 23) there are some ‘special springs within this area that are very important’, with Clanmyra Pool being associated with a dreamtime story (which is described), and also being the main pool for her family’s fishing and camping activities and the place her children and grandchildren are taken to learn about the dreamtime story. Mrs Milgin explains that ‘under our law I have to protect these places’, and she teaches her children and grandchildren about the areas they need to protect (at 25).

[41] Mrs Milgin also gives evidence about Wiliyalka spring located near Duckhole Pool, noting that it is ‘another very important spring’ that needs to be protected and Nyikina Mangala Rangers are working to fence it off to prevent damage (at 22). It is not clear whether Wiliyalka spring is on the licence, or closer to Duckhole Pool (which is approximately 3.6 kilometres outside the licence (see [14])).

[42] After describing those places, Mrs Milgin says ‘if any of these very special places get damaged under our traditional law I will be responsible and I would be very hurt. My family and families from Looma Community would also be very upset and hurt. If these places were damaged we would lose our favourite camping and hunting ground and the place we take the young people to learn about country and also the place where we help the troubled young people to get better’ (at 26-27).

[43] I do not believe there is sufficient evidence or information about the ‘special springs’ on the licence to say they are of particular significance for the people of the Walalakoo Aboriginal Corporation. Similarly, there is insufficient information about Wiliyalka Springs to suggest it is of particular significance, and it is some distance from the licence. However, I do conclude that Clanmyra Pool, and the portion of Geegully Creek which is adjacent to the licence, are very near the licence and are of particular significance to the native title holders. I have already established the social and community activities on the licence which are associated with those two sites are likely to be interfered with by the exploration activities allowed to Mr Richmond on grant. The question then is, will activities of Mr Richmond on the licence interfere with those sites of particular significance which are near to or adjacent to the licence?

*ii. Will the activities of Mr Richmond on the licence interfere with sites of particular significance?*

[44] Mr Richmond does not provide much explanation about his intended exploration activities as part of this inquiry. Further detail set out at [18]-[20] above is relevant to my consideration here.

[45] Having found there are sites of particular significance to the Walalakoo Aboriginal Corporation, it is necessary to consider the impact of grant of the licence, taking into account the nature of the exploration activities as discussed above. One issue relevant to likely interference for the purposes of s 237(b) is where the sites of particular significance are located. I have already accepted that part of Geegully Creek, and Clanmyra Pool, are adjacent to the south east portion of the licence for the purpose of this decision.

[46] In relation to Mrs Milgin’s affidavit (at 21-23, which concerns Clanmyra Pool) the State notes the evidence is precise regarding the location, such that Mr Richmond could avoid those places. Another relevant issue is the level of information/willingness regarding avoidance of any such sites. The Walalakoo Aboriginal Corporation contends that: Mr Richmond has not provided details about his proposed exploration program to them; he has made no offer to participate in cultural heritage surveys; and no information has been provided about intending to mitigate interference and risks. The State has drawn attention to various aspects of the 2010 agreement, and any mitigating effect it may have. However,

as at the date of this decision, the agreement has not been entered into in respect of E04/2358 and I refer to my comments at [32] above.

[47] The Walalakoo Aboriginal Corporation contends that simply entering part of the licence would be interference, referring to the mere presence of people which may cause direct interference in the context of people entering a licence without permission, or accessing restricted areas without consultation.

[48] Because Clanmyra Pool and Geegully Creek are adjacent to the licence, rather than being substantially on the licence, and Mr Richmond is aware of the sensitivities of those sites and the effect of the State's regulatory regime, I conclude it is unlikely Mr Richmond's exploration activities on the licence will interfere with those sites of particular significance for the purposes of my consideration of s 237(b) of the Act. However, as noted earlier in this decision, the intensive nature of the social or community activities on the south east portion of the licence and around those sites means that, for the purposes of s 237(a) of the Act, I concluded Mr Richmond's exploration activities are likely to intersect with the activities associated with those sites. Even minor activity by Mr Richmond in that area could have a direct and substantial impact on the flow of the social or community activities. However, such minor activity is unlikely to interfere with either Geegully Creek (the portion which is adjacent to the licence) or Clanmyra Pool for the purposes of s 237(b).

**Will the grant be likely to involve major disturbance or create rights whose exercise is likely to involve major disturbance to any land or waters concerned?**

[49] The Walalakoo Aboriginal Corporation briefly stated it is likely the grant will cause major disturbance to land and waters, but did not address this matter further. The State noted the Walalakoo Aboriginal Corporation hasn't pursued this criterion so didn't address it, apart from stating there is nothing in the licence likely to result in such major disturbance. Mr Richmond has not provided specific arguments or information regarding such major disturbance.

[50] There is no evidence before me to indicate the grant will likely involve major disturbance to the land and waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

### **Conclusion**

- [51] For the reasons outlined above, I find the grant of the licence is likely to directly interfere with the social or community activities of the Nyikina Mangala.
- [52] There is sufficient evidence to indicate areas or sites of particular significance to the native title holders exist which are adjacent to part of the licence. However, I find there is unlikely to be interference with those sites from exploration activities associated with the grant of the licence.
- [53] I do not conclude the licence is likely to involve, or create rights whose exercise is likely to involve, major disturbance to land or waters.

### **Determination**

- [54] The determination of the Tribunal is that the act, namely the grant of E04/2358 to William Robert Richmond, is not an act attracting the expedited procedure.

**Ms H Shurven**  
**Member**  
**23 October 2015**

## Appendix A: Draft Tenement Endorsement and Conditions

### ENDORSEMENTS

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

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

The Licensee attention is drawn to the provisions of the:

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

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

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

**In respect to Waterways the following endorsement applies:**

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

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

- 7 The abstraction of surface water from any watercourse is prohibited unless a current licence to take surface water has been issued by the DoW.
- 8 All activities to be undertaken with minimal disturbance to riparian vegetation.
- 9 No exploration being carried out that may disrupt the natural flow of any waterway unless in accordance with a current licence to take surface water or permit to obstruct or interfere with beds or banks issued by the DoW.
- 10 Advice shall be sought from the DoW and the relevant service provider if proposing exploration being carried out in an existing or designated future irrigation area, or within 50 metres of an irrigation channel, drain or waterway.

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

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

**CONDITIONS**

- 1 All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
- 2 All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.
- 3 All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.
- 4 Unless the written approval of the environmental Officer, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.
- 5 The Licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.
- 6 The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
  - the grant of the Licence; or
  - registration of a transfer introducing a new Licensee;

advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.