



National Native Title Tribunal

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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)

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NATIONAL NATIVE TITLE TRIBUNAL

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)

Application No: WO02/451

IN THE MATTER of the [Native Title Act 1993](#) (Cwlth)

- and -

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

Dora Sharpe and Others on behalf of the Gooniyandi native title claimants (WC00/10) (Native Title party)

- and -

Ashburton Minerals Ltd (Grantee party)

- and -

Ripplesea Pty Ltd (Grantee party)

- and -

The State of Western Australia (Government party)

DETERMINATION THAT THE ACTS ARE NOT ACTS ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Mr Daniel O’Dea, Tribunal Member

Place: Perth

Date: 07 May 2004

Catchwords: Native title – future acts – proposed grant of exploration licences – expedited procedure objection application – authority of native title deponent to speak for land and waters – 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 – not acts that attract the expedited procedure.

Legislation: [Aboriginal Heritage Act](#) 1972 (WA), ss 5, 17 and 18
[Mining Act 1978](#) (WA), ss 29(2) and 20(5) and 63
[Native Title Act 1993](#) (Cth), ss 29, 31, 109, 148, 151, 237(a), (b) and (c)

Cases: *Chienmora v Striker* (1996) 142 ALR 21 at 34-35

Western Australia/Winnie McHenry on behalf of the  **Noongar**  *People* [1999] NNTTA 210, Hon EM Franklyn QC (28 July 1999)

Robin Boddington and Others on behalf of the Wajarri Elders/Western Australia/Richmond Resources Pty Ltd [2002] NNTTA 236, Hon CJ Sumner (18 November 2002)

Dann v Western Australia (1997) 74 FCR 391

Moses Silver, Ishmael Andrews & Sammy Bulabul/Northern Territory/Ashton Exploration Australia Pty Ltd [2002] NNTTA 19, Mr John Sosso (1 February 2002)

Wilma Freddie/Western Australia/Steven Povey [2001] NNTTA 162, Ms Jennifer Stuckey-Clarke (19 December 2001)

Kevin Peter Walley and Others on behalf of the Ngoonoru Wadjari People/Robin Boddington and Others on behalf of the Wajarri Elders/Western Australia/Giralia Resources NL [2002] NNTTA 24, Deputy President Sumner (8 March 2002)

Smith v Western Australia (2001) FCA 19

Representative for the

Native Title party: Philip Hope, Kimberley Land Council

Representative for the Peter Apostolos Panegyres, Crown Solicitor's Office

Government party: Clyde Lannan, Department of Minerals and Petroleum Resources

Representative for the Matthew Clohessy, Emerald Tenement Services

Grantee party: Rodney Dunn, Ashburton Minerals Ltd

REASONS FOR DETERMINATION

Background

[1] On 1 May 2002, pursuant to s 29 of the [Native Title Act 1993](#) ("the Act"), the State of Western Australia ("the Government party") gave notice of its intention to do a future act, namely to grant Exploration Licences E80/2898 and E80/2899 ("the Licences") to Ashburton Minerals Ltd and Ripplesea Pty Ltd ("the Grantee") under the [Mining Act 1978](#) (WA). The notice included a statement that the Government party considered the act to be one that attracted the expedited procedure, that is one that can be done without the normal negotiation required by s 31 of the Act.

[2] On 30 August 2002, Dora Sharpe and Others on behalf of the Gooniyandi native title claimants ("the Native Title party") (WC00/10) lodged with the Tribunal an objection to the statement that the grant of the Licences attracted the expedited procedure. In this document reference was made to three proposed Licences, but on 4 September 2002 a facsimile was received from the Kimberley Land Council, representing the Native Title party, authorising the Tribunal to amend the objection application to show only two tenements – E80/2898 and E80/2899.

[3] The objection application was accepted by the Tribunal on 16 September 2002.

[4] Proposed Licence E80/2898 relates to an area of 226.88km² 104 kilometres south-west of Halls Creek within the Halls Creek Local Government Area. 28.81km² of this proposed Licence area falls within the boundaries of the Native Title party claim area. Proposed Licence E80/2899 relates to area of 139.42km² 123 kilometres south-west of Halls Creek, the area of this Licence falling totally within the area of land and waters subject to the claim by the Native Title party. Over all, 45.9% of the area subject to the objection application falls within the boundaries of WC00/10.

[5] The objection sets out at paragraph [7] the reasons why the Native Title party believes the grant of the Licences is not an act attracting the expedited procedure:

- a) the objectors have a spiritual connection with the entire area identified as subject to the proposed Licences and use the land for hunting and gathering, 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 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 objectors;
- 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 artefacts requiring identification by specialists have been left by the objectors' ancestors, and are scattered in the area of the proposed Licences. Unless first identified, recorded and protected, the very act of driving across country to the proposed Licence area, 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, the Native Title party set out the type of evidence it intended to adduce in support of its objection, including:

- a) historical affidavit and oral evidence relevant to s 237(a) and (b) of the Act;
- b) anthropological and archaeological affidavit and oral evidence relevant to s 237(a) and (b) of the Act;
- c) genealogical affidavit and oral evidence relevant to s 237(a) and (b) of the Act;
- d) linguistic affidavit and oral evidence relevant to s 237(a) and (b) of the Act; and
- e) environmental affidavit and oral evidence relevant to s 237(c) of the Act.

The Native Title party requested that oral evidence be given on country.

Directions and terms of Inquiry

[7] On 12 September 2002 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 compliance by the Government party by 23 December 2002, the Native Title party by 31 December 2002 and the Grantee party by 6 January 2003. The Government party alone complied with these Directions and following correspondence from the Native Title party representative dated 20 January 2003, and an adjourned Status Conference on 19 February 2003, a request was made to amend Directions to allow for the wet season lay off period and subsequent time to negotiate a likely agreement. Accordingly, new compliance dates were set: 30 April 2003 for the Native Title party, and 7 May 2003 for the Grantee party.

[8] The Tribunal was advised during an adjourned Status Conference on 23 April 2003 that agreement was both likely and close and, following agreement by all parties, Directions were vacated. On 15 May 2003 a lengthy adjournment to 7 August 2003 was granted to allow time for the Native Title party representative to receive instructions at a working group meeting, followed by adjournments to 14 August 2003, 28 August 2003, 11 September 2003, 18 September 2003 and finally 2 October 2003 to further stalled negotiations. Parties rejected both the option of Tribunal assisted mediation under s 150 of the Act and a consent determination that the expedited procedure does not apply in order to put the matter back into the right to negotiate stream.

[9] On 2 October 2003 the Grantee party advised the Tribunal via facsimile that agreement with the Native Title party could not be reached and requested that Directions be reinstated. On 10 November 2003 parties were advised that Native Title party compliance was due on or before 27 November 2003 and that of the Grantee party on or before 4 December 2003.

[10] Submissions on behalf of the Native Title party were received by the Tribunal on 9 December 2003 following a delay caused by an incorrect facsimile number. On 3 December 2003 the Grantee party advised they did not intend to lodge contentions but instead relied on those submitted by the Government party. Despite the earlier request by the Native Title party that evidence be given orally on country, the Tribunal received verbal advice on 12 December 2003 that they agreed to a determination 'on the papers'.

Legal issues

[11] Section 237 of the Act sets out that for an act to qualify as being an *act attracting the expedited procedure* it:

- 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

[12] The Government party contends that the Exploration Licences will not give rise to any of the issues raised by s 237(a), (b) and (c) of the Act. There are no sites registered on the sites Register of the Department of Indigenous Affairs and no Aboriginal communities within or in the vicinity of proposed Licence E80/2898. The communities of Ganinyi and Yiyili are some 9.5 kilometres north-west of proposed Licence E80/2899 but no communities exist on the tenement itself. The proposed Licences are situated on two pastoral leases – 3114/1263, known as Margaret River (vested in GC Fitzgerald), and 398/800, known as Larrawa (vested in KS Brockhurst).

[13] The Government party refers to the provisions of s 20(5) of the *Mining Act 1978* in relation to this area, and to Clauses 5, 17 and 18 of the *Aboriginal Heritage Act 1972* (WA) ("the AHA") which go to protecting Aboriginal areas or sites. Attention is also drawn to the standard conditions which will apply to the grant as set out in the schedule attached to its contentions and to the conditions which are imposed on the grant by s 63 of the Mining Act. It states that the grant will include an endorsement drawing the Grantee's attention to the provisions of the AHA. The Government Party's documentary material also includes the conditions and schedule of endorsements to be imposed on the proposed prospecting licences pursuant to the Mining Act. The area has previously been subject to exploration, three exploration licences covering the area the subject of this Inquiry having been issued and surrendered in the period 1991-2001.

[14] The Grantee Party did not file any contentions and sought to rely on those filed by the Government Party.

Material Provided by the Native Title Party

[15] The Native Title party submitted three affidavits sworn by Sam Cox, Mervyn Street and Ringer Camp.

[16] *Affidavit of Sam Cox, sworn 24 November 2003*

'I, Sam Cox, of the Moongardie Community in the State of Western Australia, Pensioner, affirm and say as follows:

1. I am a Gooniyandi Native Title Determination Application Claimant and a Gooniyandi Working Group Member, Retired Chairperson of Gardoowa Gooniyandi, Trustee of Garndoowa Gooniyandi Trust and a Yiyili Council member.
2. I was born 1st January 1936 at Louisa Downs Station.
3. *Woljardie* is my Aboriginal name, my bush name in *Galaga*.
4. I live at the Moongardie community which is about 15 kms west from the Yiyili community. The community was built in 1992 and we have lived in the community ever since.
5. Yes, I Sam Cox confirm that I am the right person who speaks for this country that the mining company wants to explore as shown on that map which has been shown to me. A copy of this map is attached and marked "A".
6. This country is a Men's law place we call *Wonga*. I follow that strong law

tradition from my father. He showed and told me the importance of this meeting area for law business. We had Corroborees (gatherings) all around this 'exploration tenement area'. The area was an important meeting place for large groups of people – who celebrate law.

INTERFERENCE WITH COMMUNITY OR SOCIAL LIFE

7. I know that Larrawa station manager Kevin Brockhurst. My wife and I go fishing at Christmas creek, Gooniyandi name *Yardal*, during flood time.
8. The fish include; Black Brim (*jambiyinbaroo*), Catfish (*gooloomangarri*), Fresh water mussels (sic) (*Ngawaya*) and we use sand frog (*nyanyboo*) for bait. There is big mobs of bush tucker along this *Yardal* area, it is an important gathering place because there are lots of trees and shade, lots of bush tucker and good waterholes and springs.
9. Hunting traditional tucker includes; Bush Turkey (*galamooda*), Emu (*garnanganyja*), Kangaroo (*wanyjirri*), goanna (*wawanyi*), Water Monitor (*girwili*), witchitty grub (*lagardi*), and even pussycat (*Ngiya*).
10. The bush tucker; Bush Plum (*girndi*), Bush potato (*boongga*), Bush banana (*goolibi*), Bush onion (*Joornda*), Bush Tomato (*Nganjaali*), Bush Yam (*Bila*), Bush Orange (*Goordida*), Sugar leaf (*warrayayi*), Sugar bag (*Ngalinya*) and Marndarra (eating gum) comes from bloodwood trees and river gums.
11. The explorers have in the past damaged our country with drills, land clearing, road making and other activities which have caused the availability of bushtucker, animals and fish to be reduced.
12. I am able to speak of these places in the exploration area as it is my country.

INTERFERENCE WITH SITES OF PARTICULAR SIGNIFICANCE

13. There is an extremely important dreaming site called *Goorranda*. The map of (E80/2899) and (E80/2898) exploration areas involves a significant story to my family. It is all about a dreaming story with a snake who eats men. The story explains about a jealous snake with the other creeks and rivers, such as the Margaret River (Marrara) in the area.
14. Another story in this area is for the *jawawoodoo*, he is Kingfisher in our language. As young people we looked after him.
15. This same area of significance involves a stony area with a story called *Laari*. This area is inside the exploration area (E80/2899). The rocks are clean with patterns and they are around that area.
16. These ceremonies are performed along those song lines (*ngalanyma*), celebrating the richness of that country and that law is practiced each year by the young people. It is an emanation site for this area.
17. They could affect our cultural areas, by building roads, camping in particular areas and or (sic) the workers not respecting our important areas. They could damage or interfere the (sic) burial sites, traditional areas or stone dreaming sites.

MAJOR DISTURBANCE TO LAND OR WATER

18. In the past, other exploring companies on the other side of the highway did a lot of exploration work with drilling, big trucks and built plenty roads. They didn't talk to us or tell us what they were doing and they used big machinery and drove straight through country. There is still large amounts of old machinery and mining rubbish, deep pits and drilled holes not fixed up. The country is still damaged and no one will come to fix it. We warn our young people about these places, it is important that they be careful.
19. We have recently been involved with mining companies and exploration

activities. We have performed Heritage Clearances (Work Program Clearances) with KLC and that was good. It is important that people understand our expectations and involve us in communications about what is going on on country.'

[17] *Affidavit of Mervyn Street, sworn 23 November 2003*

'I, Mervyn Street, Artist, of Pull-Out Community, near Fitzroy Crossing in the State of Western Australia, affirm and say as follows:

1. My name is Mervyn Street and I live at Pull-Out Springs Community. I am a member of the Gooniyandi Native Title Determination Application Claimants, a Yiyili Community Council Member, member of the Board of Directors for Louisa Downs Cattle Station and a Yiyili School Board member.
2. I was born on Louisa Downs Station, down by the tree below the Homestead on 1st July 1950. *Joowooroo* is my skin name, and *Jowadji* is my Bush name.
3. I've been living at Pull-Out Springs which is 3 kms by road from the Yiyili community. We have lived there for 5 or 6 years, I live with my wife June Davis and my mother in community built housing. Before that I lived in Yiyili community from when it was built.
4. I confirm that I speak for this area as detailed on the map from Ashburton Minerals Ltd and Ripplesea Pty Ltd, who have applied for Exploration Licence Numbers E80/2898 & E80/2899. For the purposes of identification a copy of this map is annexed to my affidavit and marked with the letter "A". I have inherited the right to speak for this country from my father's side and I also have connection from my mother's side. This country has plenty of water and springs, shade, bush tucker and is good for hunting. This country is an important gathering place.
5. I know this country well, it is my country.

INTERFERENCE WITH COMMUNITY OR SOCIAL LIFE

6. There are numerous sites inside and outside the exploration areas. Starting from the Larrawa Station Homestead, west of the exploration area (E80/2899) there is an area called *Myalngarriya*. It is an old sickness site; there is an old traditional burial site here. This area cannot be touched. We would be worried and feel hurt if any damage was done to this place. This is just outside the exploration area (E80/2899) in the westerly direction.
7. There is plenty of bush tucker along this Christmas Creek area, the Aboriginal name we call this creek is *Yardal*. This is the Aboriginal name for this part of the creek from Larrawa Station Homestead area and up towards the catchment area (south easterly direction). This is an important place because there are lots of trees and shade, lots of bush tucker, plenty of waterholes and springs. The fish include: Black Bream (*jambiyinbaroo*), Catfish (*gooloomangarri*), Fresh water mussels (*Ngawayya*). The hunting includes; Water Monitor (*girwili*), witchetty grub (*lagardi* – found in wattle trees), pussycat (*Ngiya*), Bush Turkey (*galamooda*), Emu (*garnanganyja*), Kangaroo (*wanyjirri*), goanna (*wawanyi*). The bush tucker: Bush peanut (*biriyali*), Bush Plum (*girndi*), Bush potato (*boongga*), Bush onion (*Joornda*), Bush tomato (*Nganjaali*), Bush Yam (*Bila*), Bush Orange (*Goordida*), Bush banana (*goolibi*), Sugar leaf (*warrayayi*) we get that September time, I think *Kartiya* (White person) called it lurp. Sugar bag (*Ngalinya*) this occurs on bloodwood trees and other as well. You can also eat the gum from the trees, such as river

gums, which we call *Marndarra*.

8. I would like mining companies to respect us Traditional Owners, today. The Mabo Law will make us sit together, *Kartiya* and traditional owners, around the table. Are we going to do this in the future?

9. Miners have to see us before they do anything on our traditional country. Enough damage has already been done to our country, including exploration done by BHP. This destroys the animals, fish and bushtucker that we rely on to survive.

10. I am able to speak of these places in the exploration area as it is my country.

INTERFERENCE WITH SITES OF PARTICULAR SIGNIFICANCE

11. Inside the exploration area (E80/2899) is the site of a dream time story. It involves an old bone-in-stone story called *Laari* (a type of fish fossil). The stone is like marble and its like its got lightning in it.

12. In the eastern area of (E80/2899) and western part of exploration area (E80/2898) is another dreaming site called *Goorranda*. This is where the story about a snake who travels around and comes up from the ground and eats men took place. The story tells of the jealous nature of the snake with the other creeks and rivers in the area.

13. There is another special story in this area for the *jawawoodoo*, he is Kingfisher in our language. His story is always important to us, we are always told to look after that bird and not to disturb it.

14. This exploration area has in it a recognised Men's law place. The law name we call this place in Gooniyandi Language is *Wonga*. It is an important meeting place for law business not only for Gooniyandi inside and outside the exploration area, but for people all over the desert, Some people came from Bililuna by foot as we had Corroborees inside and around this 'exploration tenement area.' This area is very close to the *Jaru* and *Gidja* people's boundaries, that's why it is a special meeting place for all groups and Gooniyandi people.

15. There are numerous sites inside and outside the exploration area. There is a spring within the exploration area called *Behoe*, it is a big waterhole, it's (sic) Aboriginal name is called *Mungardiya*.

16. Near the middle of the exploration area (E80/2899) there is an area called *Gillawa* junction, *Kardiya* (white person) also use this name. On Johnson Creek, there is also another spring water.

17. In the middle of the exploration area (E80/2899) there is an old airstrip. The Cessna plane used to check the cattle and country from there. Just nearby, there is Lumbar creek, there is a dry spring there, and this is where Martin Chestnut was born.

18. Below this area, still inside the exploration area (E80/2899) is the site of a dream time story. It involves an old bone-in-stone story called *Laarrdi* (a type of fish fossil). The eastern area of (E80/2899) and western part of the exploration area (E80/2898) involves a dreaming site called *Goorranda*.

19. Just outside the exploration area there is an area called *Myalngarriya*. It is an old sickness site; there is an old traditional burial site there.

20. These miners could affect our cultural areas. We don't know what work they are doing & where and when they are camping, what access tracks or roads they are using; they could accidentally disturb burial sites or interfere with dreaming sites, traditional areas or stones that have important arrangements and significance. We have particular stone dreaming sites; we are

concerned that they are going to be disturbed and interfered with.

21. As a Traditional Owner for this country, it is my responsibility to look after this country. This includes protecting these sites from damage and interference. If anything happens to these sites or some person is injured in this country, it is my responsibility as a Traditional Owner. Any interference with areas or sites of particular significance will cause things to come back on us. This can be prevented if proper agreements are made with the miners. We can both then go about our business.

25. A lot of *Kartiya* do not understand that any disturbance to our country can have serious consequences to us the traditional owners.

MAJOR DISTURBANCE TO LAND AND WATER

26. When we were younger, my family used to go and visit this country all the time. My father worked all through that country as a stockman, when it was all part of Louisa Station. My father and other older people, like (*Galaga*) Sam Cox's father and (old man) Gordon built all those old yards (*Kaiya* yards). We used to camp out and go hunting all the time. We followed our law and culture, visited traditional sites and went hunting throughout the seasons. The area inside and outside the exploration areas is flat good country for hunting. The women did a lot of gathering of the bush tucker; they used to sing songs (*ngalanyma*) over that country.

27. I have had a number of experiences with mining companies and their exploration activities. We have been saddened with the damage that they have done to our country and culture in the past. This has been without talking to us.

28. We have done Heritage Clearances, we did one earlier this year and that worked out fine. Both the explorer and the Traditional Owners are happy. I've had other experiences with anthropologists, geologists/fossil researchers, fish scientists, KLC projects, Law and Culture camps (for young people) and I understand the basic expectations and procedures.

29. A lot of *Kartiya* do not understand that any disturbance to our country can have serious consequences to us the Traditional Owners.'

[18] *Affidavit of Ringer Camp, sworn 23 November 2003*

I, Ringer Camp of the Yiyili Community via Fitzroy Crossing in Western Australia, Aged Pensioner, do Affirm and say as follows:

1. I am a member of the Claimants in the Gooniyandi Native Title Application Determination (WC00/10).
2. I was born on Louisa Downs Station. I do not know the year I was born.
3. *Bungardie* is my skin name, and *Darngu Wanrngu* is my Bush name.
4. I've been living at Yiyili community for about 15 years in the Community.
5. I speak for this Country. A map has been shown to me and other Traditional Owners for this area. This map shows the location of the areas in the exploration applications known as E80/2898 and E80/2899. A copy of this map is attached to this affidavit and marked with the letter 'A'.
6. I know all that country and speak for that country as a Traditional Owner of that country. I understand Ashburton Minerals Pty Ltd and Ripplesea Pty Ltd want to do exploration work over this area which is on Larrawa Station.
7. This country has plenty of water, springs, and shade, bush tucker and is good for hunting. This country is an important gathering place.
8. I know this country well, it is my country.

INTERFERENCE WITH COMMUNITY OR SOCIAL LIFE

9. There is a Men's law site, called *Wonga* in the exploration area. It is an important meeting place for law business ceremonies not only for Gooniyandi but for other people nearby. This area is very close to the Traditional Country of the *Jaru* and *Gidja* people. There are ceremonies that happen with Gooniyandi groups and other mobs from around this area come together.

10. As a young Gooniyandi man, my families and I did law and culture business and I also worked as a stockman over this country. We lived on country in stock camps and we spent plenty of time out bush. We always used traditional tucker and hunted for food out of the bush.

11. The traditional name for the creek we call *Yardal*. This (is) in the exploration area. It is important country as there are plenty of trees and shade, with bush tucker, waterholes and springs.

12. The fish we call Frog (*woogoo*), Fresh water mussels (*Ngawayaya*), Black Brim (*jambiyinbaroo*), Catfish (*gooloomangarri*). The hunting includes; Big goanna we call (*nyalalanggarra*), black headed python (*yilimi*), Water Monitor (*girwili*), witchetty grub (*lagardi*), Kangaroo (*wanyjirri*), Bush Turkey (*galamooda*), Emu (*garnanganyja*). The bush tucker we say Sugar bag (*Ngalinya*), Sugar leaf (*warrayayi*), Marndarra is from River trees gum or sap, Bush peanut (*biriyali*), Bush Plum (*girndi*), Bush potato (*boongga*), Bush onion (*Joornda*), Bush Tomato (*Nganjaali*), Bush Yam (*Bila*), Bush banana (*goolibi*)

13. I am worried that the explorers will damage this country and cause the animals and bushtucker to be destroyed. We rely on bushtucker, animals and fish to feed ourselves and our families.

INTERFERENCE WITH SITES OF PARTICULAR SIGNIFICANCE

14. There is a site inside the exploration area (E80/2899) which is a Dreaming Story Site involving an old stone called *Laari*. It is a smooth stone with white lightning in it.

15. Another Dreaming Story Site is over both areas (E80/2899 and E80/2898) involves a site called *Gorranda*. He is about a jealous snake travelling around water places and comes up from the ground and eats men. It rises up and takes people where there are living waters (springs) along *Yardal* (Christmas Creek) area.

16. There are other stories with eagles (*garnbirra*) and small birds (*jawawoodoo*) around this country ...

17. There is an area called *Myalngarriya*, which is sickness country, a few Gooniyandi old people died and are buried there. This is just outside the exploration area.

18. There is a big waterhole we used all the time. I think it *Kartiya* (white fella) name is called Behoe spring, our name call him *Mungardiya*. There are other springs around and inside this exploration area. *Gillawa* is one where flood time they all meet. There is another spring water on that Johnson Creek and a small one at Lumbar Creek, there is a dry spring there, and it is also where that young fella Martin Chestnut been born.

19. These explorers could affect our special sites. They could accidentally disturb burial sites or interfere with dreaming sites, traditional areas or stones that are important and significant to us. We have particular stone dreaming sites; we are concerned that they are going to be disturbed and interfered with.

20. It is my responsibility to look after this country. This includes protecting these sites from damage and interference. If anything happens to these sites or some person is injured in this country, it is my responsibility as a Traditional

Owner. Any interference with areas or sites of particular significance will cause things to come back on us. This can be prevented if proper agreements are made with the explorers. We can both then go about our business.

25. A lot of *Kartiya* do not understand that any disturbance to our country can have serious consequences to us the traditional owners.

MAJOR DISTURBANCE TO LAND AND WATER

26. I do not know what and how the explorers are going to do this work. Which access tracks or roads they could be using; they could accidentally disturb traditional burial sites or interfere with dreaming sites. There are stone dreaming sites that could be disturbed and affect our relationships and cultural areas.

27. I spent a lot of time travelling and living in this country. I have seen the results of earlier mining companies and the exploration. Big deep holes, rubbish left and jobs not finished. In the old days, people came through with trucks and drills; no one spoke or talked to us. Some things might change but many don't. We need strong agreements with the explorers to protect our country.

28. A lot of *Kartiya* do not understand that any disturbance to our country can have serious consequences to us the Traditional Owners.

[19] The Native Title party filed a statement of contentions with the Tribunal on the 9 December 2003. I have read and considered this material and will refer to it during the course of the reasoning that follows.

Authorisation of the Native Title deponents

[20] It is important in matters of this nature that a deponent to an affidavit establish their authority to speak in relation to the country on behalf of the Native Title party. The Tribunal has held in the past that it is important that a deponent to an affidavit specify whether they are a member of the relevant native title group, the position they hold in the claim group, on what basis they can speak for the country or site and such other information as will allow the Tribunal to ascertain that what is being deposed to is a proper reflection of the traditions of the claim group. In this matter, as has been seen, three affidavits have been sworn by Sam Cox, Mervyn Street and Ringer Camp. None of these individuals are registered native title claimants in the sense they are applicants to the application. Some additional material in relation to them can be gleaned from some of the affidavits which were filed in support of the Form 1 which combined a series of previous claims into the current claim. In the case of Sam Cox, one of the current named Gooniyandi applicants, Reenie Chestnut, deposed in an affidavit sworn on the 21 July 1999, that Sam Cox was her grandson. Given that all the affidavits provided in this matter indicate that the area, the subject of the proposed prospecting licence, is "Men's law place" it is not surprising that affidavits have not been provided by women. In any event, each of the deponents have provided material within the affidavit which goes to establishing their authority to speak on behalf of the applicant group. In the case of Sam Cox, he confirms that he is the right person to speak for the country which the mining company wants to explore (paragraph [5]) and asserts in paragraph [12] that he is able to speak for these places because it is "my country". He also confirms in paragraph [1] of the affidavit that he is a member of the Gooniyandi Working Group, the retired Chairperson of Gardoowa Gooniyandi, Trustee for the Gardoowa Gooniyandi Trust and Yiyili Council member. In the case of Mervyn Street, he deposes in paragraph [4] that he has a right to speak for the area the subject of the mining application and asserts that he has inherited the right to speak for the country from his father and in paragraph [5] says "I know this country well. It is my country". He repeats in paragraph [10] "I am able to speak of these places in the exploration area as it is my country". In paragraph [21] he asserts that he is a traditional owner of the country and that it is his responsibility to look after the country and that he may in fact suffer repercussions in the event that he fails to do so. Again in paragraph [1] he deposes to the fact that he is a

member of the claimant group, of the Yiyili Community Council and the Yiyili School Board. In the case of Ringer Camp, he asserts he is a member of the claimant group (paragraph [1]), that he speaks for the country (paragraph [5]) and at paragraph [6] he says "I know all that country and speak for that country as a Traditional Owner of that country", paragraph [8] he says "I know this country well, it is my country". In paragraph [20] he says "It is my responsibility to look after this country. This includes protecting these sites from damage and interference. If anything happens to these sites or some person is injured in this country, it is my responsibility as a Traditional Owner."

[21] In this matter, 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 exploration licences.

Legal Principles

[22] In *Kevin Peter Walley and Others on behalf of the Ngoonoru Wadjari People/Robin Boddington and Others on behalf of the Wajarri Elders/ Western Australia/Giralia Resources NL*, [2002] NNTTA 24, Deputy President Sumner (8 March 2002) (WO01/179 and WO01/180), considered the applicable legal principle in relation to s 237 (paragraph [7-23]). These matters have also been discussed in an enlightening fashion by Member Sosso in the matter *Moses Silver, Ishmael Andrews and Sammy Bulabul/ Northern Territory/Ashton Exploration Australia Pty Limited*, [2002] NNTT DO01/13, Mr John Sosso (1 February 2002). I accept the enunciation of the relevant legal principles in those matters for the purposes of this determination.

Findings

Community or social activities (s 237(a))

[23] The Tribunal must consider the likelihood of interference "directly with the carrying on of community or social activities of the persons who are holders of the native title." Mr Cox, Mr Street and Mr Camp all depose about such activities carried on by Gooniyandi 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 a material relevant to the various limbs of s 237 scattered throughout the affidavits.

[24] The contentions of the Native Title party relevant to this limb of s 237(a) are as follows:

- a) the Grantee party has failed to indicate either their intentions regarding exploration programmes and has chosen instead to rely on Government party submissions. As such it must be presumed that activities will be carried out to the full extent permitted by the Licences (paragraph [12]);
- b) the grant of the tenements without consultation with the Native Title party is likely to cause spiritual and emotional distress to claimants in addition to interfering physically with community and social activities, in particular in the Christmas Creek (*Yardal*) area and the law area (*Wonga*) (paragraph [19]);
- 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 [21] C and D);
- d) the area the subject of the proposed Licences is used "frequently" by members of the

Native Title party because the land is well suited to camping, fishing, hunting and gathering of bush tucker and medicines, it is close to the communities of Yiyili and Moongardie, it contains or is close to areas of significance and the pastoral lessees do not interfere with the carrying on of social and community activities (paragraph [22] A and B);

[25] Mr Cox deposes that he lives at Moongardie community, which Geospatial analysis reveals is some 17 km to the west-north-west of proposed Licence E80/2899. He "knows" the Larrawa station manager and accesses the Christmas Creek (*Yardal*) area to go fishing with his wife during "flood time" (paragraph [7]). He further deposes that the *Yardal* area is rich in bush tucker and native fauna but that past explorers have damaged the country to the extent that the quantities of bush tucker, animals and fish have been reduced. However, despite a lengthy list of flora and fauna available and the assertion that it is an "important gathering place" (paragraph [8]) because of the shade, waterholes and springs, Mr Cox does not indicate expressly how frequently or how recently the area has been utilised by members of the Native Title party for hunting, gathering or general enjoyment. It is reasonable to infer that he and his wife go fishing at *Yardal* at flood time to catch the fish he enumerates, and also to hunt and collect the animals and plants he describes. The reference he makes in paragraph [8] to the "big mobs of bush tucker along this *Yardal* area, it is an important gathering place because there are lots of trees and shade, lots of bush tucker and good waterholes and springs" appears to me to clearly indicate contemporaneous knowledge of the flora and fauna of the area and the social activities conducted upon it. It is also clear from the geospatial material we have been able to obtain that Christmas Creek or *Yardal* is within the area of licence E80/2899.

[26] Mr Cox also deposes that the Men's law place known as *Wonga* "was an important meeting place for large groups of people – who celebrate law" (paragraph [6]), although once again evidence of recent gatherings in this area is noticeably lacking. In the section entitled "Interference with Sites of Particular Significance" he refers to ceremonies performed along song lines (*ngalanyma*) and indicates that the "law is practiced each year by the young people" (paragraph [16]), from which I can infer that this particular community activity is still in current practice.

[27] Mr Street states that he lives at Pull-Out Springs Community which he places three kilometres by road from Yiyili community. This information would put his home around 12 kilometres from the area of the objection. He reiterates Mr Cox's assertions that the country subject to the proposed Licences is good for hunting "throughout the seasons" (paragraph [26]) and is an important gathering place, and provides a little more clarification on the exact location of *Yardal*, which he deposes to extend from the Larrawa Station Homestead area in a south-easterly direction towards the catchment area (paragraph [7]). Perusal of the map provided by the Government party reveals two creeks extending from the Larrawa Homestead area, one of which follows an easterly course into the area of proposed Licence E80/2899 before turning south-easterly; the other progressing directly south-east but bypassing the tenement area. Mr Street deposes to hunting and collecting similar fish, bush tucker and animals to those described in the affidavits of Mr Cox and Mr Camp. He does identify that the collection of sugar leaf or Warrayayi usually occurs in September. As with the affidavit of Mr Cox, it would have been helpful if he had been a little more explicit in his affidavit as to the frequency and exact location of his visits to the area, the subject of the proposed exploration licences. However, given that he expresses such a broad knowledge of the area and expresses his comments in the present tense, I am prepared to infer that these activities continue to be carried on today in appropriate climatic circumstances. Mr Street reiterates the concerns of Mr Cox that the activities of miners will reduce the availability of bush tucker and animals and fish. He also makes reference to the damage allegedly done by a mining company during the course of exploration and the effect that that had on the land, but in the absence of any further evidence from them, or any indication from the record as to the involvement of that particular mining company in this

area, I can take that matter no further whatever its relevance may have been.

[28] The affidavit of Mr Camp is consistent with those of Mr Cox and Mr Street in its description of the *Yardal* area, the range of bush tucker available, and the physical description of the country. Mr Camp deposes to live at Yiyili community which is approximately 10 kilometres north-north-west of the objection area and indicates that he spent much of his time as a "young" man camping on the country concerned, doing "law and culture business", and hunting and gathering bush tucker and native fauna. Mr Camp is unable to verify the year of his birth but describes himself as an "Aged Pensioner" which would indicate that these activities occurred some time in the distant past rather than recently. However he does affirm that "ceremonies" take place involving "Gooniyandi groups and other mobs," (paragraph [9]), and that they "rely on bushtucker, animals and fish to feed ourselves and our families" (paragraph [13]), from which I can infer that ceremonial, hunting and gathering activities are ongoing. His deposition that he worked as a stockman over the country goes to verify his knowledge of the area, but I do not find it relevant to the carrying on of community and social activities.



[29] The Native Title party contends that community and social activities should be construed as not limited to mere physical activities and should be construed as including activities of a spiritual dimension. They cite *Silver* per Sosso at paragraph [56] and *Robin Boddington v Giralia Resources* per Sumner at 14-21. This proposition clearly overstates the correct position. As said by Member Sosso in *Silver* at paragraph [58] "...the Tribunal's inquiry is not directed at ascertaining the likely interference with activities per se, but, rather, those activities which are a manifestation of claimed native title rights and interests". The spiritual dimension may well be recognised but it must be rooted in real likelihood of direct physical interference with activities on the ground. In light of the significant extent of the physical activities which the evidence indicates occurs on the ground I do not need to take this subject further in the context of this determination.

[30] The affidavit evidence satisfies me that the area subject to proposed exploration licence E80/2899 is currently utilised by the Native Title party to a significant degree for the purposes of hunting, fishing, camping, collecting bush tucker, conducting ceremonies and as a communal meeting place. *Yardal* and *Wonga* on E80/2899 are repeatedly referred to. Such activities are clearly capable of being characterised as community and social activities. However, the evidence before me is insufficiently specific to satisfy me that such activities are carried out on the area the subject of the proposed licence E80/2898. There are no specific references to any activities of a social or communal nature carried out on E80/2898 and on that basis, I must find that s 237(a) is not attracted by that proposed Licence.

[31] In relation to E80/2899, the next question 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 to in the *Smith* case and adopted in *Silver* at page 92. Given the nature of the activities that the Grantee party would be entitled to undertake once the proposed exploration licences has been granted, and in circumstances where there has been no indication from the Grantee party as the manner in which it intends to exercise the prerogatives granted to it under the licence, I am satisfied that the carrying on of those activities is likely to directly interfere with the social and community activities of the Native Title party.

Sites of particular significance (s 237(b))

[32] 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 proposed exploration licences is likely to interfere with these areas or sites I have referred to the detailed depositions from Mr Cox, Mr Street and Mr Camp on behalf of the Native Title party. I have also taken into account the contentions of the Native Title party and the Government party.

[33] The Native Title party contends that:

- a) the proposed tenements are located in a site rich area and the Grantee party has not indicated their compliance with the Guidelines for Aboriginal Consultation by Mineral and Petroleum Explorers, nor have they provided any details of how they intend to avoid interference with Aboriginal sites and areas of significance (paragraph [15]);
- b) 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, particularly with regard to land rich in sites of particular significance (paragraph [27]-[30]);
- c) 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 (paragraph [32] and [22]);
- d) the provisions of the AHA are merely brought to the Grantee party's attention upon grant of the Licences, and the Guidelines for Aboriginal Consultation by Mineral and Petroleum Explorers are advisory only, providing inadequate reassurance that sites and areas of significance would be protected (paragraph [35] and [36]);
- e) the Native Title party contends that notwithstanding Department of Indigenous Affairs data which identifies no sites, there are in fact at least six sites of particular cultural, traditional or mythological significance in the area of the proposed Licences, as evidenced by the affidavits of Sam Cox, Mervyn Street and Ringer Camp:
 - i. *Wonga* (para [14] – affidavit of Mervyn Street, para [6] – affidavit of Sam Cox)
 - ii. *Goorranda* (para [13] – Sam Cox, para [12] – Mervyn Street, para [15] – Ringer Camp)
 - iii. *Laari* (para [14] – Ringer Camp, para [11] – Mervyn Street, para [15] – Sam Cox)
 - iv. *Myalngarriya* (para [17] – Ringer Camp, para [6] – Mervyn Street)
 - v. *Marrara* (para [13] – Sam Cox)
 - vi. *Mungardia* (para [15] – Mervyn Street, para [18] – Ringer Camp);
- f) sites connected to, but not located within, the tenement area may also be impacted upon, both spiritual and physically, by exploration activities (paragraph [19]);

[34] Department of Indigenous Affairs Site Register information provided by the Government party indicates there are no recorded sites in the area of the proposed tenements. 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. Neither does the presence of a site or area, recorded or otherwise, establish that site to be of particular significance to the Native Title party

[35] All three affidavits attest to the area known as *Wonga*, a Men's law place situated in the area subject of proposed E80/2899. Mr Street and Mr Camp depose that *Wonga* is located close to the *Jaru* and *Gigja* people's boundaries. I am prepared to accept that *Wonga* is a law place of more than ordinary significance to the Native Title party on the basis that Mr Cox, Mr Street and Mr Camp all depose that it is an "important" and "special" meeting place for people from all over the desert "who celebrate law" (paragraph [6], affidavit of Sam Cox), not just the Gooniyandi groups, and that Corroborees and ceremonies did occur regularly there, although only Mr Camp implies that these gatherings may still be ongoing. Mr Street deposes that "some people came from Bililuna by foot" (paragraph [14], affidavit of Mervyn Street), Bililuna (also spelt Billiluna) being some 100 kilometres distant from the proposed Licence area. It is a matter for conjecture however, as to how long ago this particular event occurred.

[36] The dreaming site of *Gorranda* is accorded significance in all three affidavits, Mr Street specifying its location "in the eastern area of (E80/2899) and western part of exploration area (E80/2898)" (paragraph [12]), and Mr Cox attesting it to be "extremely important" site involving "a significant story to my family" (paragraph [13]). The dreaming story involves a jealous snake who travels around water places and comes up from the ground to eat men; Mr Camp states that the snake takes people "where there are living waters (springs) along *Yardal*", and Mr Cox refers to the Margaret River (*Marrara*) area, which I can presume refers to the pastoral lease partially covering E80/2898. I am prepared to accept that *Gorranda* is of more than usual significance to the Native Title party on the basis of Mr Cox's affidavit evidence.

[37] Mr Cox, Mr Street and Mr Camp all refer to the site of significance involving the story called *Laari* (*Laarrdi* in Mt Street's evidence), placing it within the area of exploration Licence E80/2899. However, there are no further details beyond reference to "bone-in-stone" (fish fossil) and a "smooth stone with white lightning in it" so I am unable to ascertain if the site carries more than ordinary significance to the Native Title party. Certainly "stone dreaming sites" are mentioned by all three deponents. (Mr Cox at paragraph [17], Mr Street at paragraph [20] and Mr Camp at paragraph [19]).

[38] Both Mr Street and Mr Camp depose about the "sickness site" of *Myalngarriya* which is located "just outside the exploration area (E80/2899) in the westerly direction" (paragraph [6]). Exactly how far away from the area is not made clear but it is a traditional burial site for Gooniyandi people and Mr Street specifies that "this area cannot be touched". It is clearly of more than ordinary significance to the Native Title party based on Mr Street's evidence, but may not be subject to physical exploration disturbance being situated outside of the proposed Licence area. Paragraph [44] of the Native Title party submission contends that "according to the beliefs of the Native Title Party, the sites that are connected to, but not located within, the tenement area may be impacted upon, both physically and spiritually, by exploration activities in the tenement area". I am prepared to accept that Mr Street believes spiritual damage could occur even though the site is outside the boundaries of the exploration area. However, this of itself would be insufficient to attract the second limb of s 237.

[39] The site called *Marrara*, referred to in the Native Title party contentions (paragraph [42]), does not appear to be accorded more than usual significance. Indeed Mr Cox only refers to the site in passing at paragraph [13] of his affidavit as an adjunct to *Laari* and there is no real indication of its location.

[40] Mr Street and Mr Camp refer to the presence of several springs and waterholes in the area subject to the objection, including one at Lumbar Creek where "that young fella Martin Chestnut been born" (Ringer Camp – paragraph [18]). The fact that both native title holders refer to the birthplace of Martin Chestnut (who I take to be related to named applicants Reenie Chestnut and Topsy Chestnut) is indicative of the significance of this site to the Gooniyandi people but not on its face particular significance to the group as a whole.

[41] Another large waterhole, known as *Mungardiya*, is specifically named by Mr Street and Mr Camp, and Mr Street places it within the exploration area (paragraph [15]). Mr Camp deposes this waterhole was "used all the time" and further refers to an area called *Gillawa* "where flood time (the springs) all meet" (paragraph [18]) – from this I can infer the area would be utilised regularly by the Native Title party. I am unable to find these springs and waterholes to be of more than usual significance as sites, but can infer that they would be visited in the course of normal community and social life.

[42] Mr Cox and Mr Street attest to a "special story in this area for the *jawawoodoo*" or Kingfisher (paragraph [14] – Sam Cox, paragraph [13] – Mervyn Street). Both men make reference to this story after describing *Gorranda*, the implication being that the *Jawawoodoo* area is nearby and therefore within the exploration area. Mr Street states that this story is "always important "to the Gooniyandi and that they must always look after the bird and "not disturb it". On the basis of these assertions, the area may to be of more than ordinary significance to the Native Title party but the evidence is insufficient for me to conclude that the site is one of particular significance.

[43] On the basis of the evidence before me, I am persuaded the area of the proposed tenements is a site rich although not all of those sites have been shown to be of particular significance. I do find however that the area Wonga on E80/2899 and the site of *Gorranda* on the area of E80/2899 and the western (and relevant) portion of E80/2898 are sites or areas of particular significance to the Native Title party.

[44] With regard to the presumption of regularity and the protective provisions of the AHA, I broadly adopt the reasoning of Hon CJ Sumner in *Robin Boddington and Others on behalf of the Wajarri Elders/Western Australia/Richmond Resources Pty Ltd* [2002] NNTTA 236 (18 November 2002), at paragraph [22] and the observations of Member Stuckey-Clarke in *Wilma Freddie/Western Australia/Steven Povey* [2001] NNTTA 162, (19 December 2001) (WO99/882) at paragraph [49]. The Grantee party has provided no evidence of his intentions regarding protection of sites of significance and while I accept their undoubted intention to adhere to the provisions of the law there is a real risk of inadvertent interference unless consultation with the Native Title party takes place.

[45] Consequently I find that the proposed grant of E80/2899 and E80/2898 is likely to interfere with areas or sites of particular significance.

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

[46] Section 237(c) of the act requires a predictive assessment of whether the act of granting the Licences or the exploration activities undertaken upon grant of the Licences are likely to involve major disturbance, the meaning of which was considered in *Dann v Western Australia* (1997) 74 FCR 391. 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.

[47] The three deponents refer to damage which has allegedly occurred to land in the past as a result of exploration activities. What is not clear is the extent of this damage, its location and when it occurred. There is no specific evidence other than the reference in Mr Street's affidavit at paragraph [9] to BHP however none of the previous tenements held in the objection area where held by BHP.

[48] The primary concern of the deponents appears to be that in the past exploration activities have taken place without discussion with the native title holders: "In the old days, people came through with trucks and drills; no one spoke or talked to us" (Ringer Camp – paragraph [27]). Mr Cox and Mr Street reiterate this, emphasising that many *Kartiya* (white men) do not understand that disturbance to country

can have "serious consequences" to traditional owners. However nothing in the evidence addressed the issue of the likelihood of major disturbance with the requisite degree of specificity.

[49] Consequently I am unable to find that the proposed grant of E80/2899 and E80/2898 is likely to involve major disturbance to land and waters within their boundaries.

Determination

[50] The determination of the Tribunal is that the grant of Exploration Licences E80/2898 and E80/2899 to Ripplesea Pty Ltd and Ashburton Minerals Ltd are not acts which attract the expedited procedure under the Act.

Daniel O'Dea
Member
07 May 2004