NATIONAL NATIVE TITLE TRIBUNAL

Michael Ross & Others on behalf of the Cape York United Number 1 Claim v Gamboola Resources Pty Ltd and Another **[2018] NNTTA 10 (2 March 2018)**

Application No: QO2016/0042

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

- and -

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

Michael Ross & Others on behalf of the Cape York United Number 1 Claim (QC2014/008)
(native title party)

- and -

Gamboola Resources Pty Ltd
(grantee party)

- and -

State of Queensland
(Government party)

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

Tribunal:	Mr JR McNamara
Place:	Brisbane
Date:	2 March 2018

Catchwords: Native title – future act – proposed grant of exploration permit – expedited procedure objection application – whether act likely to interfere directly with the carrying on of community or social activities – whether act likely to interfere with sites or areas of particular significance – whether act likely to cause major

disturbance to land or waters – expedited procedure not attracted

Legislation: *Native Title Act 1993* (Cth) ss 151(2), 155, 203AD, 237

Mineral Resources Act 1989 (Qld)

Aboriginal Cultural Heritage Act 2003 (Qld) s 23(3)(a)(v)

Aboriginal Land Act 1991 (Qld)

Nature Conservation Act 1992 (Qld)

Cases: *Barbara Sturt and Others on behalf of the Jaru Native Title Claimants v Baracus Pty Ltd* [2014] NNTTA 32 (‘*Sturt v Baracus*’)

Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Faustus Nominees Pty Ltd [2007] NNTTA 15 (‘*Cherel v Faustus Nominees*’)

Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/State of Queensland [2006] NNTTA 3 (‘*Cameron v Hoolihan*’)

Cheinmora v Striker Resources NL; Dann v State of Western Australia (1996) 142 ALR 21; [1996] FCA 1147 (‘*Cheinmora v Striker Resources*’)

Daisy Lungunan and Others on behalf of Nyikina and Mangala/Western Australia/Geotech International Pty Ltd [2012] NNTTA 24 (‘*Lungunan v Geotech International*’)

Dann v Western Australia (1997) 74 FCR 391; [1997] FCA 332 (‘*Dann v Western Australia*’)

Evelyn Gilla & Ors on behalf of the Yugunga-Nya People v Monument Murchison Pty Ltd [2016] NNTTA 51 (‘*Gilla v Monument Murchison*’)

Gooniyandi Aboriginal Corporation RNTBC v Kimberley Granite Quarries Pty Ltd [2016] NNTTA 1 (‘*Gooniyandi v Kimberley Granite Quarries*’)

Harvey Murray on behalf of the Yilka Native Title Claimants/Western Australia/Drew Griffin Money [2011] NNTTA 91 (‘*Murray v Money*’)

Isaac Hale and Others on behalf of Bunuba #2 v Mings Mining Resources Pty Ltd and Another [2015] NNTTA 49 (‘*Hale v Mings Mining Resources*’)

Jaru Native Title Claimants/Western Australia/Golden Granite Pty

Ltd/Krama Pty Ltd [2013] NNTTA 123 (‘*Jaru v Golden Granite*’)

Little v Oriole Resources Pty Ltd (2005) 146 FCR 576; [2005] FCAFC 243 (‘*Little v Oriole Resources*’)

Little v Western Australia [2001] FCA 1706 (‘*Little v Western Australia*’)

Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) RNTBC v FMG Pilbara Pty Ltd [2015] NNTTA 4 (‘*MNR v FMG Pilbara*’)

Ngan Aak-Kunch Aboriginal Corporation RNTBC v Glencore Bauxite Resources Pty Ltd [2016] NNTTA 22 (‘*Ngan Aak-Kunch v Glencore*’)

Rosas v Northern Territory (2002) 169 FLR 330; [2002] NNTTA 113 (‘*Rosas v Northern Territory*’)

The Miriuwung Gajerrong 1 (Native Title Prescribed Body Corporation) Aboriginal Corporation RNTBC/Western Australia/ Seaward Holdings Pty Ltd [2006] NNTTA 74 (‘*MG v Seaward Holdings*’)

Silver v Northern Territory (2002) 169 FLR 1; [2002] NNTTA 18 (‘*Silver v Northern Territory*’)

Smith v Western Australia (2001) 108 FCR 442; [2001] FCA 19 (‘*Smith v Western Australia*’)

State of Western Australia/Glen Derrick Councillor and Others on behalf of the Naagaju Peoples; Leedham Papertalk and Others on behalf of the Mullewa Wadjari People/Bayform Holdings Pty Ltd [2010] NNTTA 41 (‘*Councillor v Bayform Holdings*’)

Walley v Western Australia (2002) 169 FLR 437; [2002] NNTTA 24 (‘*Walley v Western Australia*’)

Wanparta Aboriginal Corporation/Western Australia/Bradford John Young & Julie Lynne Young [2013] NNTTA 77 (‘*Wanparta v Young*’)

Ward v Northern Territory (2002) 169 FLR 303; [2002] NNTTA 104 (‘*Ward v Northern Territory*’)

Ward v Western Australia (1996) 69 FCR 208; [1996] FCA 1452 (‘*Ward Western Australia*’)

WF (Deceased) & Ors on behalf of the Wiluna Native Title Claimants/Western Australia/Emergent Resources Pty Ltd [2012] NNTTA 17 (‘*WF v Emergent Resources*’)

Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd [2014] NNTTA 8 (‘*Yindjibarndi v FMG Pilbara*’)

Representatives of the native title party:	Mr David Yarrow, Counsel Mr Phillipe Savidis, Cape York Land Council
Representative of the grantee party:	Mr James Sunter, LANTCH Pty Ltd
Representatives of the Government party:	Mr Marc McKechnie, Counsel Ms Leilehua Helu, Crown Law Mr Chris Rawlings, Department of Natural Resources, Mines and Energy

SUMMARY

As this matter may be of public interest, the National Native Title Tribunal has prepared this summary to accompany the determination. The summary does not form part of the determination; the only authoritative statement of the Tribunal's reasons is the determination itself. The published reasons for the determination and this summary are available on the Tribunal's website (www.nntt.gov.au) and through Austlii.

Michael Ross & Others on behalf of the Cape York United Number 1 Claim v Gamboola Resources Pty Ltd and Another **[2018] NNTTA 10**

The National Native Title Tribunal determined the proposed grant of exploration permit EPM 26190 ('the permit') by the State of Queensland to Gamboola Resources Pty Ltd ('Gamboola') is not an act attracting the expedited procedure. This matter is one of the two first expedited procedure objection applications in Queensland that has resulted in a determination that the expedited procedure does not apply since the introduction of the State's Native Title Protection Conditions ('NTPCs') (see also *Michael Ross & Others on behalf of the Cape York United Number 1 Claim v Lithium Australia NL and Another* [2018] NNTTA 10).

The objection application

In June 2016, the State gave notice of its intention to grant the permit under the *Mineral Resources Act 1989* (Qld), and included a statement that it considered the grant to be an act attracting the expedited procedure. The area of the permit falls within the boundaries of the Cape York United Number 1 native title claim. The registered native title claimants for that claim ('the native title party') exercised their right to lodge an objection against the assertion that the expedited procedure applied to the grant under s 32(3) of the *Native Title Act 1993* (Cth) ('NTA').

The role of the Tribunal

When the Tribunal receives an objection, it must conduct an inquiry to determine whether the proposed future act is an act attracting the expedited procedure (s 32(4) of the NTA). This is an inquiry process in which the parties have no obligation to negotiate about the doing of the act. As a matter of practice, the Tribunal may allow parties reasonable opportunity to negotiate a resolution.

When making an expedited procedure objection determination, the Tribunal must take into account the criteria in s 237 of the NTA. This requires the Tribunal to consider whether the proposed act is likely to: interfere directly with the carrying on of the community or social of the native title holders; interfere with areas or sites of particular significance to the native title holders in accordance with their traditions; or involve, or create rights whose exercise is likely to involve, major disturbance to the land or waters concerned. The Tribunal must make a predictive assessment about whether there is a real risk of interference or disturbance upon the evidence before it.

If the Tribunal determines any of these effects is likely, the State and grantee party must negotiate in good faith with the native title party with a view to reaching agreement about the act. If the Tribunal is satisfied there is no real risk or chance the act will have those effects, the act can validly proceed without the requirement for negotiations.

The State's regulatory regime

The relevant Queensland regulatory regime includes the *Aboriginal Cultural Heritage Act 2003* (Qld) and Cultural Heritage Duty of Care Guidelines, the *Nature Conservation Act 1992* (Qld) and the NTPCs. The NTPCs are a standard set of conditions the State places on exploration permits granted under the expedited procedure to address cultural heritage management and provide processes for inspections, notice requirements and administrative payments. On the evidence in this matter, the Tribunal is satisfied the compliance and enforcement of NTPCs is well managed and the regime is generally effective in ensuring the s 237 criteria are met where the State asserts the expedited procedure applies.

However, it is unlikely any regulatory regime will satisfactorily manage the effects of all future acts, in all circumstances, to the extent required by s 237 of the NTA. While the Tribunal may give weight to a regulatory regime, it must consider each case on its own facts. That is, it must assess whether there is a real risk of interference or disturbance upon analysis of the particular facts of the matter. This may involve assessing whether the relevant regime will adequately address the identified risk [84], [95].

The grantee party's intentions

Evidence of how a grantee party intends to exercise the rights conferred by the grant of a permit may be relevant in assessing whether the expedited procedure applies, although the weight attributed to that evidence will depend on the circumstances of the particular case.

In this matter, evidence suggested Gamboola proposed to exclude areas of particular significance from its exploration program and implement other protective measures, such as pre-collaring drill holes. The Tribunal noted that while it should not dismiss such evidence on the basis that intentions do not always translate into action, it may be appropriate to have regard to whether such intentions are enforceable [80].

Basis for determination

The Tribunal considered the nature and frequency of the native title party's social and community activities, including land management; camping; teaching of language and culture; and fishing, and balanced these with evidence of Gamboola's proposed activities. Noting the notifiction requirements of the NTPCs would likely limit the effect of explortion activities, the Tribunal concluded interfence with the native title party's activities per s 237(a) was not likely [43]–[48].

However, the Tribunal found the evidence established it was likely the proposed grant would interfere with sites of particular significance to the native title party per s 237(b), despite the

application of the State's regulatory regime and Gamboola's stated intentions. It also found the grant was likely to result in major disturbance to the land and waters concerned per s 237(c). The following factors, which the Tribunal found were established on the evidence, were significant in these conclusions:

- The 'mound springs area' associated with an important story and a number of matchwood burial sites located on the permit area are of particular significance to the native title party in accordance with their traditions [59], [62];
- There are established laws and customs about what can and cannot be done on the mound springs area, including that members of the native title party are not allowed to disturb the ground or take stones from the area, or let anyone else do so [109];
- The matchwood burial sites are difficult to identify and it is important their location remains secret. The area of these sites is very important to the native title party, who cannot let people go there unaccompanied or at all [62];
- Gamboola would be likely to undertake exploratory drilling in identified target areas, a small section of which overlaps areas of the mound springs area [34], [111]. Its stated intention to avoid areas of particular significance was not stated in the affidavit evidence or incorporated in any agreement or undertaking [111]–[112];
- The NTPCs would not require Gamboola to arrange a field inspection for certain exploration activities, such as grab sampling and rock chip sampling, and thus may not sufficiently protect the mound springs area and the matchwood burial sites from interference [115]–[116];
- There is a real risk exploratory drilling would disturb the underlying hydrology of the area, which would affect the mound springs. Expert evidence suggested Gamboola's proposal to pre-collar drill holes did not sufficiently mitigate the risk of disturbing groundwater flow paths [114], [128].

Final comments

Despite there being no obligation to negotiate when the expedited procedure is notified, it appears Gamboola voluntarily engaged in a constructive way with the native title party, and the native title party engaged with Gamboola in a considered manner. The native title party maintained their objection to the expedited procedure and as a result this inquiry was conducted. Through the inquiry process, details of facts and circumstances regarding significant sites which were particularly within the knowledge of the native title party emerged, as did a clearer picture of the operation and effectiveness of the State's regulatory regime. Together this provides the foundation for any negotiations in relation to the proposed grant which might follow.

END OF SUMMARY

REASONS FOR DETERMINATION

[1] In June 2016, the State of Queensland gave notice of its intention to grant exploration permit EPM 26190 to Gamboola Resources Pty Ltd ('Gamboola') under the *Mineral Resources Act 1989* (Qld). In notifying its intention to grant the proposed permit, the State included a statement that it considers the grant to be an act attracting the expedited procedure. An act attracting the expedited procedure is a proposal that affects native title, also known as a future act, which can be validly done without going through the normal negotiation process under the *Native Title Act 1993* (Cth). This decision concerns whether the State can validly grant the proposed permits without such negotiations between the State, Gamboola and the registered native title claimants for the area as would otherwise be required under the right to negotiate provisions of the *Native Title Act*.

[2] The proposed permit is situated in the Shire of Cook on Cape York Peninsula. It comprises an area of 225 square kilometres, located approximately 130 kilometres east of Pormporaaw, and falls within the external boundaries of the Cape York United Number 1 claim. I also note that the proposed permit is within an area of Aboriginal freehold granted to the Olkola Aboriginal Corporation under the *Aboriginal Land Act 1991* (Qld) pursuant to the terms of the Olkola Land Transfer Indigenous Land Use Agreement.

[3] The notice issued by the State specifies that the grant would authorise the holder to explore for minerals for a term not exceeding five years and to seek renewal of the permit for a term not exceeding five years. Where the State asserts that a proposal attracts the expedited procedure, any registered native title claimant for the area may object to the inclusion of the statement by the end of the four-month notification period.

[4] In December 2016, the registered native title claimants for the Cape York United Number 1 claim, whom I will refer to throughout these reasons as the native title party, lodged an application with the Tribunal objecting to the assertion the expedited procedure applied to the grant. When the Tribunal receives an objection, it must conduct an inquiry to determine whether the proposed future act is an act attracting the expedited procedure, though as a matter of practice it allows parties the opportunity to negotiate a resolution.

[5] Following the lodgement of the objection, President Raelene Webb QC appointed me to constitute the Tribunal for the purposes of conducting an inquiry into the objection and determining whether the proposed permit attracts the expedited procedure. In making that determination, I must have regard to the following matters, which are set out in s 237 of the *Native Title Act*:

(a) Is the proposed grant likely to interfere directly with the carrying on by the native title holders of their community or social activities?

(b) Is the proposed grant likely to interfere with areas or sites of particular significance to the native title holders in accordance with their traditions?

(c) Is the proposed grant likely to involve, or create rights whose exercise is likely to involve, major disturbance to the land or waters concerned?

[6] If the answer to any of these questions is 'yes', then the State and the grantee party must negotiate in good faith with any registered native title claimants or registered native title bodies corporate with a view to reaching agreement about the grant. If I am satisfied there is no real risk or chance that the proposed grant will have those effects, then the grant can validly proceed without the requirement for negotiations. The Tribunal's task is to form a view on these matters by undertaking a predictive assessment of what is likely to occur as a result of the grant, taking into account the rights conferred, what is proposed to be done and the applicable regulatory regime (see *Walley v Western Australia* at [8]–[9]).

[7] The native title party bring the application on behalf of the members of the claim group particularly concerned with the land and waters the subject of the proposed permit, consistent with the authorising principles of the Cape York United Number 1 claim. The native title party state that the Olkola Aboriginal Corporation is the representative body for these members, though I should clarify that it is not a representative body of the kind recognised in s 203AD of the *Native Title Act*. I accept for the purposes of the objection that the Olkola People are the relevant native title holders for the area.

The conduct of the inquiry

[8] Following a period of negotiations between the parties, I issued directions for the inquiry on 26 June 2017. The directions required each party to provide a statement of contentions and documentary evidence relating to the matters for determination.

[9] Further to those directions, the native title party provided, in addition to its statement of contentions, a range of documents including the affidavits of Michael John Ross and Robert Burns. Mr Ross is a member of the Cape York United Number 1 claim group and is one of the individuals comprising the registered native title claimant. He is also a director of the Olkola Aboriginal Corporation. Mr Ross states that his tribe is Olkola and he is part of the Kurrumbila People, whose traditional country includes the southern half of the proposed permit area. Mr Burns is also a member of the claim group and is part of the Kan Kan People and Dingo People, whose country includes the northern half of the permit area. I accept that Mr Ross and Mr Burns have authority to speak on behalf of the native title party for the land and waters within the proposed permit area.

[10] The native title party also provided a copy of a research report published in 2014 and entitled *Crosbie Station Physical and Biological Landscapes, Olkola Country, Cape York Peninsula*. The report was the result of a research partnership between Olkola traditional owners, the Olkola Aboriginal Corporation and a group of multi-disciplinary research scientists with funding from the Commonwealth Government and the Department of Environment and Heritage Protection ('EHP'). The report records the results of a three-day field study undertaken in July 2012, centred on the Crosbie Creek floodplain and the surrounding Holroyd Plain. I refer to the report throughout these reasons as the Crosbie Station Report.

[11] Gamboola relies on the affidavit of Mark Anthony Dugmore in support of its statement of contentions. Mr Dugmore is a geologist and director of Gamboola and oversees the daily operations of the company including the management of exploration. He is also involved in the technical analysis and strategic direction of exploration targets, as part of the company's Technical Committee, and is responsible for the provision of directions for the company's involvement in matters relating to native title, cultural heritage, land access and environmental issues. The State also provided its own statement of contentions and associated documents in reply to the native title party.

[12] The native title party, exercising its right of reply, then provided a further statement of contentions and other documents including the affidavits of Mr Phillip James Duffey and Dr Jeffery Gray Shellberg. The Olkola Aboriginal Corporation has employed Mr Duffey as its executive officer and in-house lawyer since July 2015. Prior to this, Mr Duffey worked with the Olkola People as a lawyer for the Cape York Land Council, where he represented the Olkola People in negotiations with the State for the handback of five pastoral properties under the Olkola Land Transfer Indigenous Land Use Agreement. In his current role, Mr Duffey assists with the management and implementation of activities for the Olkola People. Dr Shellberg is a hydrogeomorphologist with 25 years of experience in earth science and 11 years of field experience on Cape York Peninsula. He has also worked with the Olkola People and provided advice to the Olkola Aboriginal Corporation since 2012 on the management of the physical landscapes within the proposed permit area. I note that Dr Shellberg was the lead author of the Crosbie Station Report.

[13] I convened a listing hearing in this matter on 14 November 2017. At the listing hearing, the native title party requested that the matter be set down for a one-day hearing. The native title party advanced two reasons for that request. First, they submitted that the cultural evidence in the affidavits of Mr Ross and Mr Burns is best heard orally. Second, they highlighted differences of opinion between the parties as to the effect of drilling on the land that needed to be explained in further detail. While the State was open to a hearing, there were differing views as to the possible location. Gamboola maintained the matter should be heard on the papers (that is, without a hearing).

[14] At the conclusion of the listing hearing, I directed parties to provide a list of potential dates for a possible hearing in Cairns and gave leave for the State to provide further affidavit material to address issues raised in the native title party's reply, subject to any comments the native title party wished to make in relation to that request. On 17 November 2017, the native title party sent an email to the Tribunal renewing their request for a hearing and proposing that it be held in Cooktown. In light of that request, I decided to reconvene the parties for a further listing hearing to discuss the possibility of a hearing in Cooktown.

[15] At the adjourned listing hearing on 29 November 2017, counsel for the native title party noted its 'strong preference' for the hearing to take place in Cooktown based on its

convenience for the traditional owners and their level of comfort in giving evidence. Counsel for the State advised that, while it did not oppose a hearing in Cooktown in principle, it did not support the proposed timing, whereas Gamboola maintained its position that the Tribunal could deal with the matter on the papers. I adjourned the listing hearing and reserved my decision on whether the matter should proceed to a hearing.

[16] I handed down my decision to hear the matter on the papers on 15 December 2017. In my statement of reasons for that decision, I acknowledged that a hearing might have had some value in terms of putting the native title party's evidence in context. I also noted the convention that traditional owner evidence is best heard in person. However, I observed that the native title party did not intend to lead any new evidence and it was not suggested by any party that the material provided during the inquiry was insufficient to support its contentions. This material included a video embedded in the Crosbie Station Report, which I found to be of great assistance in contextualising the evidence. As I noted in my reasons, s 151(2) of the *Native Title Act* requires the Tribunal to hold a hearing if it appears that the issues for determination cannot be adequately determined in the absence of parties.

[17] I have had regard to the reasons for my decision not to hold a hearing and, having considered the documents provided by each party, I remain of the view that the matter can be adequately determined on the papers in accordance with s 151(2).

Interference with community or social activities: s 237(a)

[18] The Tribunal's task under s 237(a) is to determine whether the grant of the proposed licence is likely to interfere directly with the carrying on of the native title party's community and social activities. The interference must be substantial and not trivial in its effect on the activities (see *Smith v Western Australia* at [26]).

What activities do the Olkola People carry on in the permit area?

[19] The affidavits of Mr Ross and Mr Burns outline a range of community and social activities undertaken by the Olkola People and the Olkola Aboriginal Corporation in and around the area of the proposed permit. Mr Duffey's affidavit provides further

information about these activities in his role as executive officer and in-house lawyer for the Olkola Aboriginal Corporation.

[20] One class of activity the Olkola People undertake on country is teaching and passing on knowledge to younger people. The evidence suggests this kind of activity occurs in both formal and informal ways. For instance, Mr Ross states that he often takes young people camping on country to pass on his knowledge. Similarly, Mr Burns says he takes opportunities to teach his family, particularly his granddaughters, about country and culture when they are out working on the station. Mr Ross also describes taking Olkola children out on country as part of school programs and refers to one occasion where he took 11 Olkola children to a lagoon on Eight Mile Creek.

[21] The Olkola Aboriginal Corporation also holds a cultural camp each year, where senior Olkola elders work with young people to pass on knowledge about stories and culture. These annual camps also incorporate the Olkola Language Program, in which Olkola elders work with children to develop a dictionary of the Olkola language. In his affidavit, Mr Ross states they had planned a cultural camp at Glen Garland Station taking place the following week, during which they would be 'visiting different parts of Olkola Country, including the EPM area'.

[22] The evidence also suggests the Olkola Aboriginal Corporation carry on a range of land management activities over an area that includes the proposed permit. Mr Ross refers to a ranger program that is responsible for monitoring unauthorised access to the area as well as vegetation plot monitoring and weed control. Mr Ross also states that the area is part of the Olkola Ajin Early Season Burning Carbon Abatement Project, in which rangers carry out traditional patchwork burning following the wet season and go out on country to fight late season fires.

[23] Another land management activity the Olkola Aboriginal Corporation undertakes is a program of cattle mustering and extraction. As part of this program, the Olkola Aboriginal Corporation engages Mr Burns and other members of his family involved in the cattle operation at Strathmay Station to muster cattle away from the Crosbie area and the mound springs in particular. Mr Ross also notes that the Corporation has worked with scientists to survey the land and carry out research in the Crosbie area, some of which resulted in the Crosbie Station Report.

[24] Other activities described in the evidence include fishing and visiting sites of significance. Mr Ross states that there are 'lots of lagoons and creeks in the Crosbie area' and Mr Burns says they 'also go fishing a lot along the Coleman River and in the waterholes south towards Crosbie within the EPM area'. I note that the Crosbie Station Report also records that an 'important food fish for the Traditional Owners' was 'readily caught from the lagoon and creek sites across the sampling area'. With respect to site visits, Mr Burns refers to a story place located south of Strathmay Homestead that he and his family access by way of a track from Strathmay to Crosbie.

Are the activities community or social activities?

[25] Gamboola contends that the native title party have not demonstrated that the activities described in the affidavits are 'community or social activities'. In this respect, Gamboola refers to a distinction I drew in *Ngan Aak-Kunch v Glencore* between 'looking after' or 'managing' country and community or social activities of the kind that can be considered under s 237(a). The State seeks to draw the same distinction.

[26] In *Ngan Aak-Kunch v Glencore*, the native title party's primary contention in relation to s 237(a) was that the grant of the proposed mineral development licence would interfere with the exercise of its right to make decisions about the use of the area. In that matter, I observed that the way the right had been described bore some similarity to the responsibility for 'managing country' that had been considered in other Tribunal decisions, such as *Yindjibarndi Aboriginal Corporation v FMG Pilbara*. However, as there was no specific evidence as to how decision-making took place in the licence area, I found that, although the native title holders were entitled as a matter of law to exercise certain rights and interests in relation to decision-making, that did not on its own support a finding that they carried on any community or social activities.

[27] In the present case, the affidavit material outlines a range of activities undertaken by the Olkola people, some of which could be characterised as 'looking after' or 'managing' country, but which are nonetheless activities. Although many of these activities are organised or facilitated through the Olkola Aboriginal Corporation, I accept they are community or social activities given they are undertaken on behalf of the Olkola People to give effect to their communal rights and interests.

[28] A possible exception is the operation of the cattle station at Strathmay. There are unresolved questions as to whether and in what circumstances a business venture may be considered a 'community or social' activity (see *MG v Seaward Holdings* at [33]−[34]). For present purposes, I accept that removing cattle from the Crosbie area is a 'community or social' activity given that it is facilitated by the Olkola Aboriginal Corporation and carried on in exercise of the native title party's registered non-exclusive right to protect places of traditional significance, namely the mound springs.

What activities are Gamboola likely to undertake on the permit area?

[29] The activities Gamboola intends to undertake on the permit area are outlined in the affidavit of Mr Dugmore and its approved work program, a copy of which is provided by the State.

[30] The approved work program covers a two-year period. In the first year, the program contemplates technical review, geophysical data processing and interpretation, reconnaissance and the collection of geochemical samples. In the second year, the program involves airbourne magnetics, ground gravity, geophysical data processing and a review of geological and technical data. The evidence of Mr Dugmore, on the other hand, suggests that Gamboola intends to carry out exploratory drilling and has identified four target areas within the permit area. Mr Dugmore states that, based on a review of mapping and available aerial photography, Gamboola believes the target areas are accessible via existing roads and tracks. He also states that Gamboola has a 'degree of flexibility' in selecting the location of proposed drill holes, particularly in the early stages of exploration. Mr Dugmore says compliance with standard environmental conditions will mean that drilling and other ground disturbing activities will be located 'some distance away' from watercourses.

[31] The State notes that drilling is not included in the approved work program and cannot be undertaken unless the permit conditions are varied or drilling is added to the work program on renewal of the permit. However, the State has not suggested that renewal of the permit or variation of the conditions would trigger a new future act.

[32] The native title party contend that, in deciding whether the expedited procedure applies to the proposed permit, the Tribunal is obliged to consider the full scope of rights proposed to be conferred. In this respect, they say the activities authorised

under the *Mineral Resources Act* are 'particularly broad' and permit 'extracting and removing from land for sampling and testing an amount of material, mineral or other substance in each case reasonably necessary to determine its mineral bearing capacity or its properties as an indication of mineralisation'.

[33] Alternatively, the native title party say the Tribunal should consider that all activities proposed by Gamboola in its submissions and in its correspondence with the native title party form part of the exploration proposal. In particular, they argue the grantee party's clear and stated intention is to undertake drilling and other advanced activities. As it is within the Minister's discretion to vary the permit conditions, they say these intentions are relevant to assessing the likelihood of interference.

[34] In determining whether the expedited procedure applies to the proposed permit, the Tribunal must undertake a predictive assessment of what is likely be done, rather than what could be done, as a result of the grant (see *Smith v Western Australia* at [23]; *Little v Oriole Resources* at [49]–[52], [57]). Evidence as to how a grantee party intends to exercise the rights conferred may be relevant to that assessment although, as the Tribunal observed in *Walley v Western Australia* at [9], the relevance and weight of that evidence will depend on the circumstances of the particular case. In this case, the approved work program authorises a range a low-impact exploration activities such as reconnaissance and geochemical sampling. I accept that the program is indicative of the activities Gamboola will undertake in the first two years of the permit. The evidence of Mr Dugmore however indicates that Gamboola intends to undertake exploratory drilling in the four identified target areas during the life of the permit. Gamboola's correspondence with the native title party, which expressly contemplates a program of appraisal drilling, also supports the conclusion that its activities are likely to move beyond those described in the approved work program.

[35] Although I accept that drilling cannot proceed under the terms of the current work program, I consider it is likely that Gamboola will seek to vary the work program to authorise drilling or include drilling in the work program on renewal of the permit. On this basis, I have taken into account that the exploration activities will likely extend to drilling in the four identified target areas, subject to my comments below regarding Gamboola's intentions with respect to the Zone 4 or 'Potallah' target area.

What is the likely effect of the grant on the community or social activities?

[36] The native title party contend that the proposed exploration activities would 'directly and detrimentally affect' their spiritual connection to their country, the strength of their story places and, in turn, the strength and health of their people. They also contend that the grant will directly interfere with the operation of community and social activities such as cattle mustering and the carbon abatement project.

[37] Gamboola contends that the evidence does not disclose how the proposed exploration will directly interfere with or necessarily be inconsistent with the community and social activities described in the affidavits of Mr Ross and Mr Burns. The State contends there is no evidence of the specific 'social activities' carried on in the area and, in any event, the Native Title Protection Conditions ('NTPCs') would require Gamboola to notify the native title party of all proposed exploration activities, which will give parties the opportunity to enter into arrangements to avoid interference.

[38] In his affidavit, Mr Duffey outlines what he anticipates to be the effect of the proposed exploration on the Olkola People's community and social activities, based on his work with the Olkola Aboriginal Corporation. He says the proposed exploration will affect these activities in two ways. First, the Olkola People believe that if Gamboola is allowed to access the area and undertake exploration activities such as soil sampling and drilling, it will have a detrimental effect on their spiritual connection to the land. Second, the proposed exploration will interfere with land management programs undertaken by the Olkola Aboriginal Corporation, such as the carbon abatement project and cattle extraction operations.

[39] In terms of the effect on the Olkola People's spiritual connection to country, the native title party rely on the comments of Carr J in *Ward v Western Australia* at 223:

> … there is no justification for requiring a direct interference with community life also to be a physical interference. Section 237(a), in stating that the first requirement of an act attracting the expedited procedure, requires that the act does not directly interfere with the community life of the native title holders. It does not say that such direct interference has to be of a physical type. 'Community life' might include all sorts of spiritual and the like activities which might be directly interfered with without any physical interference. For example, the very thought of intensive exploration activities, perhaps involving vehicles, bulldozers and other heavy equipment and setting up seismic lines on hunting grounds ten kilometres away, could upset an Aboriginal community and directly interfere with its community life without any physical interference with that life. Members

> of that community might well be very distressed by the thought of such activities. The spiritual part of life falls quite readily, as a matter of ordinary language, into what is encompassed by 'community life.'

[40] I note these observations predate the 1998 amendments to the *Native Title Act*, which, among other things, replaced the words 'community life' in s 237(a) with the expression 'community or social activities'. For this reason, his Honour's comments are no longer applicable to the extent they require the Tribunal to consider the likelihood of interference with the spiritual aspects of community life as distinct from interference with activities. The Tribunal has previously found that, in evaluating the risk of interference, it may have regard to the spiritual dimension of a particular community and social activity (see *Silver v Northern Territory* at [56]). However, the question the Tribunal must answer is whether the grant is likely to interfere directly with the carrying on of that activity.

[41] There is a suggestion in Mr Duffey's affidavit that any impact on the Olkola People's spiritual connection to the land will also have an effect on the language program and the cultural camps. In particular, Mr Duffey refers to a conversation he had with Mr Ross and other directors of the Olkola Aboriginal Corporation in October 2017. It is worth quoting the words he attributes to Mr Ross in full:

> We won't have any culture to pass on if people go into our Country down there and drill holes, especially at Crosbie. They don't know what they are dealing with. It is proper cultural country. If our totems are gone, if our Country is sick and our story places are dead, then so are we, so is our culture. Our Language is our culture. If It [*sic*] is as simple as that. They are not separate. It is all connected. We won't have these language and cultural programs because our culture is based on our Country and our Story Places. Without them we are gone as a Tribe.

[42] This statement speaks powerfully of the Olkola People's connection to the land and the relationship between language, culture and country. I acknowledge Mr Ross' belief that the proposed exploration would diminish their culture to such a degree that it would affect their ability to pass on their knowledge to the next generation. However, even if I were to accept that belief, I am not satisfied it is the kind of interference contemplated by s 237(a). The Federal Court has observed that the concept of direct interference 'involves an evaluative judgment that the act is likely to be a proximate cause of the apprehended interference' (see *Smith v Western Australia* at [26]). Though French J (as he then was) cautioned against applying a 'precise and semantic cause and effect in every case', the interference must be substantial in its effect on the community and social activity.

[43] In my view, any effect the proposed exploration will have on the Olkola People's spiritual connection to the land is unlikely to be substantial. There are a range of factors that might influence any decision by the Olkola People to discontinue the language program and the cultural camps. I also do not consider that the proposed exploration is likely to interfere directly with the ability of the Olkola people to undertake cultural camps and other activities associated with the teaching of language and culture, given the frequency of these camps and the fact the NTPCs will require Gamboola notify the native title party of any proposed exploration activity.

[44] In terms of the land management programs, Mr Duffey says the proposed exploration will interfere with them in several ways. Specifically, he says the proposed exploration will affect the carbon abatement project by increasing the presence of people and activity in the Crosbie area, increasing the risk of late season fires; and creating an impediment to fighting late season fires through the possibility of human activity in the area. He also states the proposed exploration would potentially affect carbon farming, which is one of the Olkola Aboriginal Corporation's main sources of income. In relation to the cattle extraction operations, Mr Duffey says the proposed exploration will increase the time and resources needed to find cattle because the increased human presence in the area would affect the movement of cattle, which would in turn decrease the effectiveness and economic viability of the cattle removal operations.

[45] I accept that an increased risk of late season fires might interfere with early season burning, as it could lead to a reduction in the area available for carbon farming. However, given the nature of the proposed exploration, I am not satisfied the grant of the proposed permit would increase that risk to such a degree that it could properly be described as having a substantial impact on the carbon abatement project. Similarly, I do not consider the proposed exploration would have such an effect on the movement of cattle within the area of the proposed permit that it would substantially interfere with the cattle extraction operations. In terms of direct interference with the carrying on of these activities, there is no evidence as to the frequency or intensity with which the Olkola People use the area for these purposes and therefore little basis on which to assess the likely risk of interference.

[46] As discussed above, there is evidence that Olkola people fish along the Coleman River and in waterholes within the proposed permit area. In my view, the proposed exploration

is unlikely to interfere substantially with these activities, as it is likely to be limited in duration and confined to the specified target areas. In particular, I note that a large section of the Coleman River falls outside these target areas. I have also had regard to the fact that the NTPCs will require Gamboola to notify the native title party about proposed exploration activity. Although the NTPCs are principally concerned with heritage issues, I accept they can provide the parties with opportunities to consult about how to avoid interfering with the Olkola People's community and social activities.

[47] For similar reasons, I do not consider the grant will interfere substantially with the ability of Olkola people to visit story places within the proposed permit area. Although the 'Coleman' target area appears to encroach on the story place described in the affidavit of Mr Burns, it is unlikely the proposed exploration would prevent Mr Burns and his family from having access to the site. In any case, exploration activity in that area would be subject to notification and potentially field inspection under the NTPCs, which would provide the native title party with opportunities to address any access issues.

[48] In light of these reasons, I do not find that the grant of the proposed permit is likely to interfere directly with the carrying on of the Olkola People's community and social activities.

Interference with areas or sites of particular significance: s 237(b)

[49] Section 237(b) requires the Tribunal to consider whether there is a real chance or risk that the proposed future act is likely to interfere with areas or sites of particular significance to the native title holders in accordance with their traditions. Whether the proposed future act is likely to cause such interference must be considered in the light of the traditions relating to the area or site in question (see *FMG Pilbara v Yindjibarndi Aboriginal Corporation* at [75]−[76]). A precondition of the inquiry is the identification of relevant areas or sites (see *Yindjibarndi Aboriginal Corporation v FMG Pilbara Pty Ltd* at [125]).

What areas or sites have the native title party identified in relation to the permit area?

[50] The native title party's submissions on s 237(b) are concerned primarily with the area within the Alkura section of the Olkola Nature Refuge, particularly the mound springs. However, the affidavit material identifies a number of other sites that are said to be of significance to the Olkola People.

[51] The refuge was established under a conservation agreement entered into by the Olkola Aboriginal Corporation and the State of Queensland in December 2014. Schedule 2 of the agreement states that the Alkura section 'covers 2,720 ha in the central portion of the former Crosbie holding and contains the geologically intriguing mound spring area'. The schedule describes the mount springs as 'raised piles of mud and gravel' and refers to the area's 'high cultural and conservation value'.

[52] The evidence of Mr Ross establishes that the mound springs area is associated with the Kangaroo Rat story. According to Mr Ross, the mounds consist of rocks and pebbles created by the Kangaroo Rat or *Alkura*. The Crosbie Station Report describes the mound springs as occurring 'in clusters of individual and overlapping mounds less than a metre high and 3-10 m across' within the central Crosbie floodplain. A map annexed to Mr Ross' affidavit depicts the Kangaroo Rat Story as covering the southern portion the proposed permit area.

[53] The evidence also identifies other story places in the vicinity of the proposed permit. According to Mr Ross, the Rainbow Serpent Story is located south of the *Alkura* story (the map depicts the site as approximately three kilometres from the southern boundary of the proposed permit). Further south are the Kingfisher and Moon story sites. Mr Ross also refers to the Filesnake Story or *Ookayansch*, which he says is to the north of the *Alkura* story. According to the map, this site is approximately one kilometre to the east of the proposed permit area.

[54] Another area mentioned in Mr Ross' affidavit is the lancewood country. Mr Ross identifies this area as situated to the north of the *Alkura* story and it is depicted on the map as abutting or overlapping the northwest portion of the *Alkura* area. Mr Ross states that the lancewood is an important tree for the Olkola People and they are in the process of declaring an area of lancewood within the Olkola National Park a 'Restricted Access Area' for cultural purposes.

[55] Mr Burns states that the proposed permit is 'around where the broader story areas of the Kan Kan and Dingo meet'. He says the Strathmay Homestead 'would be considered Dingo Country' although both the Dingo and the Kan Kan are considered dreaming stories or totems for the Strathmay area. Mr Burns says there are also smaller story places within that area, several of which are situated near the homestead. These include the story places for the Crocodile or *Olgarlu*, the Cabbage Tree and the Rainbow Snake. According to the map, each of these places is wholly or partly within the boundaries of the proposed permit.

[56] Mr Burns identifies a separate story place to the east of the homestead, which he says is associated with the Little Gecko or *Undani*, and another further east associated with the Emu and the Brolga. The map indicates that the eastern boundary of the proposed permit encroaches on the Little Gecko story place, while the Emu and Brolga site is located approximately five kilometres from the same boundary. Mr Burns also refers to a site associated with a water bird which he says is close to the Rainbow Snake Story, though it is not identified on the map, and another site located northwest of the proposed permit area, which is associated with the Bandicoot story.

[57] Mr Ross and Mr Burns also refer to the existence of gravesites in the area where the proposed permit is situated. Mr Ross says these sites are found 'throughout all that country' while Mr Burns states that burial sites exist 'in along the banks of Emily Creek'. Each of them describe these sites as marked by upside-down matchwood trees, though Mr Ross says it is 'difficult for the untrained eye to pick them'.

Are any of the areas or sites identified of particular significance to Olkola People?

[58] An area or site of particular significance is one of 'special or more than ordinary significance' (see *Cheinmora v Striker Resources* at 34). The particularity of its significance must be capable of being identified and the area or site must 'clearly stand out in some way' from other sites and the country at large. This recognises that certain areas or sites may be generally significant to native title holders, whereas others will be of particular significance in accordance with their traditions (see *WF v Emergent Resources* at [39]; *Yindjibarndi v FMG Pilbara* at [130]).

[59] The evidence clearly establishes that the mound springs are an area of particular significance to the Olkola People. Mr Ross states that the mound springs are a 'very strong story place for us' and are connected to another story covering a larger area. Mr Ross maintains that, if stones are taken from the Crosbie area or drilling is allowed to take place, it will 'make young kids sick' and 'be the end of the few Old People we have left'. The findings of the Crosbie Station Report also support the area's particular significance, in that 'local cultural laws' prevented its authors from disturbing the mound springs or their immediate surroundings. The video evidence in particular emphasises the fact that the mound springs are part of an interconnected system that is rich with cultural significance. In reaching this conclusion as to the particular significance of the mound springs, I have also had regard to Mr Ross' statement that the Crosbie area and the *Alkura* story place are 'particularly important to me and my family', noting his association with and responsibilities for the area.

[60] The status of the other story sites is less clear. Mr Ross speaks generally about the need to protect his people 'by protecting their story sites and upholding our law'. He says these stories form part of 'an interlocking landscape of cultural stories that blanket the Olkola Area', including the proposed permit area. Mr Ross also states that '[e]veryone who accesses that country needs to respect all of the stories and the law of the country' and '[w]e can't give permission to people to do things to our Story Places on our Country if we can't do it ourselves'. However, with the exception of the mound springs area and the Crocodile Story Place, the evidence does not address the particular significance of individual story places. Though I note that Mr Ross describes the area associated with the Filesnake Story as very sensitive, I do not consider the description sufficiently identifies the site's particular significance, as distinct from other areas in Olkola country. While I accept that story places are important to Olkola People, I am not satisfied that the places identified are areas or sites of the particular significance within the meaning of s 237(b).

[61] With respect to the Crocodile Story Place, I note Mr Burns' evidence that his father and grandfather are buried at the site. Mr Burns describes the area as 'a very special place' and says he and his family visit the site using a track between Strathmay and Crosbie. I also note Mr Burns' particular association with the Strathmay area and his responsibilities for that area in accordance with traditional law and custom. In these circumstances, I accept the story place is a site of particular significance in accordance

with the traditions of the native title party. This finding accords with the Tribunal's approach in previous decisions involving burial sites where the evidence identifies a specific traditional, historical or familial connection with the site (see *Jaru v Golden Granite* at [46]; *Gooniyandi v Kimberley Granite Quarries* at [62]).

[62] Similar questions arise in relation to the matchwood burial sites. In certain cases, the Tribunal has been prepared to accept that a burial site is a site of particular significance in the absence of evidence describing the specific connection between the site and the laws and customs of the native title holders (see *Councillor v Bayform Holdings* at [43]; *Wanparta v Young* at [46]). In my view, there is sufficient material on which to find that matchwood graves are sites of particular significance in accordance with the native title party's traditions. Mr Ross says the Olkola People are the only people in Cape York who 'mark their dead' in this manner. He states that they 'wouldn't want people wandering into that country, regardless of whether they are accompanied by Traditional Owners' and it is important their location remains secret. Similarly, Mr Burns deposes that these areas 'are very important to us' and 'we can't have people going into this area unaccompanied'.

[63] The State submits that I am not required to consider the impact of the proposed grant on these burial sites, as the evidence does not identify the location of the sites. It refers to the well-established principle, articulated in *Silver v Northern Territory* at [91] and supported by the Federal Court's observations in *Little v Western Australia* at [78], that an area or site must be able to be located and the nature of its significance explained for the Tribunal to undertake the predictive assessment required by s 237(b). In reply, the native title party submit that information about the location of these sites has been kept secret because they require the guidance of traditional owners to properly identify them and the native title party have been instructed not to provide the information even with appropriate undertakings.

[64] I accept there are cultural protocols that regulate the disclosure of information relating to the location of sites of this nature. However, the Tribunal cannot properly assess the risk of interference if the sites are not identified. If that information could not be made public, the native title party could have asked the Tribunal to issue non-disclosure directions under s 155 of the *Native Title Act*.

[65] There are references in the affidavit material that suggest, in broad terms, the location of these sites. For example, Mr Ross says there are matchwood burial sites 'in that country'. However, in the context of his affidavit, it is not clear to which country he is referring and I do not consider the statement sufficiently identifies the sites in question. On the other hand, Mr Burns states there are burial sites 'in along the banks of the Emily Creek' to the north of Strathmay Homestead. In my opinion, this statement provides a sufficient basis for identifying the sites.

[66] I have reached this conclusion having regard to the nature of the sites, the sensitivities around the disclosure of information about the sites, and Mr Burns' particular association and familiarity with the area in which they are said to be located. For these reasons, I am satisfied there are matchwood burial sites within the proposed permit area, notwithstanding the fact the location of individual sites has not be precisely identified. In my view, I am entitled to have regard to the possibility that the proposed permit will interfere with these sites.

[67] In terms of the lancewood area to the north of the Alkura section, I note Mr Ross' evidence regarding the significance of the lancewood tree and the protocols observed in relation to areas where they are found. Mr Ross says the tree is 'very important to us' and is used to make spears and woomeras. He states that, when Olkola people need to take a tree, they need to talk language to it and ask permission. Mr Ross also states that no one is allowed to knock down these trees and that Olkola People do not hunt in lancewood country because the place 'needs to be left alone'.

[68] The evidence suggests there are other areas where lancewood trees may be found. I note in particular Mr Ross' evidence that the Olkola Aboriginal Corporation is in the process of declaring a lancewood area within the Olkola National Park as a restricted access area for cultural purposes. It is not clear how common these areas are. However, on balance, I accept the lancewood country near the proposed permit area is an area of particular significance given the tree's importance in Olkola tradition and the protocols that exist in relation to areas where these trees are found.

Is the permit area 'site rich'?

[69] In addition to the sites identified in the affidavit material, the native title party submit that the area is 'site rich' in the sense that the phrase has been used in previous Tribunal decisions such as *Ward v Northern Territory*. In support of this submission, they say the paucity of sites registered on the Queensland Aboriginal Cultural Heritage Database is not suggestive of a lack of sites or indicative of their significance. The native title party contend that I should conclude on this basis that there is a real risk of interference, inadvertent or otherwise, with sites that exist or may reasonably be inferred to exist within the area of the proposed permit unless there is consultation about the grant and the activities to be undertaken by Gamboola.

[70] Gamboola contends that the reference to the potential that other areas or sites of significance exist within the proposed permit area does not support an argument that the area is 'site rich'. It says a significant number of the sites identified in the affidavit evidence are outside the area affected by the proposed permit and the native title party have not identified how activities authorised by the grant would interfere with these sites. The State supports this argument and submits there is insufficient evidence to support the native title party's contention that Gamboola's presence in the area would create a real risk of interference with areas or sites of particular significance.

[71] In reply, the native title party contend that the story places identified in the affidavit evidence should be viewed collectively as part of the broader spiritual landscape of the Olkola People. In particular, the native title party say the mound springs should not be seen in isolation, but as part of the surrounding Kangaroo Rat Story. In support of this argument, they refer to the evidence of Dr Shellberg, where he recalls a conversation with a senior elder during which the elder described to him a story line traversing south to north from the Alice River to the Crosbie Creek and through the proposed permit area to the Coleman River and its tributaries. I note Dr Shellberg has marked the path taken by the story line on a map annexed to his affidavit.

[72] It is useful in this context to quote the Tribunal's observations in *Ward v Northern Territory* at [82]:

> The term 'site rich' is simply a short hand description of an area of land and waters where the number and nature of sites is such that the Tribunal is put on notice that, even applying the presumption of regularity, there is often a real chance or risk that

> the act in question will interfere with the spiritual fabric of the locality. In short a site rich area can be understood not only as an area where the number of sites is large, but also that the number of sites is itself sometimes a manifestation of the overall spiritual importance of the land and waters in the relevant locality. This in turn is a matter that can be of relevance when making an assessment of the likelihood of interference pursuant to section 237(b) in a number of respects. In each case, of course, the Tribunal must be guided on the nature of the evidence before it and it is not possible or sensible to make any broad and sweeping generalisations about the implications of finding that an area is site rich.

[73] In subsequent decisions, the Tribunal has questioned the usefulness of introducing a term of art such as 'site rich'. In *Lungunan v Geotech International* at [43], Member O'Dea observed that it 'may imply a range of assumptions which are not necessarily the case in any particular evidentiary situation', though he acknowledged there may be circumstances in which the grantee party will need to show how interference, including inadvertent interference, can be avoided. I also note the Tribunal's general comments about the term 'site rich' in *Hale v Mings Mining Resources* at [81]:

> The Tribunal has found on a number of occasions that the term 'site rich' is not a particularly helpful lens through which to view the issues that need to be determined in an inquiry such as this. To the extent that 'site rich' has been used in previous decisions, it has reflected an evidentiary conclusion about the existence of areas or sites of particular significance and the likelihood of interference … The central issue remains whether the grant of the licence is likely to interfere with areas or sites of particular significance. The nature or distribution of the areas or sites may have a bearing on the risk of interference. However, the evidence must establish the existence of areas or sites likely to be affected by the grant of the licence. It is not enough to simply assert an area is 'site rich' or provide reasons why sites that may exist in a given area have not been identified.

[74] In this case, there is no basis on which to infer the existence of areas or sites not otherwise identified in the affidavit material. Dr Shellberg's evidence is that a senior elder told him of a story line that follows 'a series of mound springs, sacred water places, story places and surrounding country'. A few observations can be made about this statement. First, Dr Shellberg does not identify the sites or provide any information as to where they are situated in relation to the proposed permit area. Second, Dr Shellberg does not have any direct knowledge of the existence or traditional significance of these sites. Third, he does appear to have any relevant anthropological or archaeological expertise. Finally, and most importantly, there is already evidence before the Tribunal from traditional owners who are responsible for the area and had the opportunity to identify any other areas or sites of significance to them in accordance with their traditions.

[75] The other point that should be addressed is whether the sites identified in relation to the proposed permit area are indicative of the 'overall spiritual importance' of the relevant locality. The question here is whether the land and waters in which the permit is proposed to be granted or any part thereof constitutes an area of particular significance in accordance with the traditions of the native title party. In this respect, the native title party note that Dr Shellberg's evidence about the story line is corroborated by Mr Ross, whose evidence suggests that the Alkura story continues across to the Lakefield area, and is consistent with the cluster of sites identified around the Coleman River in the northern part of the proposed permit.

[76] As I have already discussed, I find that the Crosbie Mound Springs area is one such area. I also note Mr Ross' statement that the story places are 'part of an interlocking landscape of cultural landscape of stories' that covers the Olkola area, including the area of the proposed permit. However, I am not persuaded that the relationship between the sites and features identified in the evidence is such that the area as a whole can be considered a discrete and identifiable area as distinct from specific sites and features. In particular, the evidence does not show how the area within the proposed permit is distinguishable from the rest of Olkola country or indicate the kinds of activities likely to interfere with that area, as opposed to individual sites.

What are Gamboola's intentions with respect to heritage protection?

[77] The native title party note that, in the course of the objection proceedings, representatives of Gamboola met with members of the Olkola Aboriginal Corporation to provide them with an overview of the proposed exploration activities and to seek the views and support of those who attended, though they submit that the meeting is not relevant to the current inquiry. While Gamboola concurs with that submission, it submits that its correspondence with the native title party is relevant to the extent it demonstrates the company's intentions about the proposed exploration.

[78] Specifically, Gamboola argues it has consistently indicated, in its correspondence with the native title party, its willingness to adapt its exploration program to respond to the native title party's concerns about disturbance to cultural heritage generally and, in particular, to exclude the mound springs area from preliminary exploration activities pending further negotiations. I note in this regard the letter from James Sunter of

LANTCH Pty Ltd addressed to Philippe Savidis of the Cape York Land Council, in which Mr Sunter communicated Gamboola's offer to enter into an arrangement whereby, as a minimum, it would not access the Zone 4 or Potallah target area during its initial exploration program. The letter also suggests that Gamboola was willing to consider, as part of that arrangement, a condition that exploration could only occur in Zone 4 with the agreement of both parties.

[79] The State submits that the evidence as a whole suggests Gamboola has given due consideration to cultural heritage and engagement with traditional owners. In particular, it notes that Gamboola engaged Mr Sunter to provide advice on native title and cultural heritage matters and to represent the company in negotiations with the native title party; provided information about the target areas; and offered to amend the initial exploration program to exclude Zone 4. The State says this evidence is indicative of Gamboola's intention to exercise its rights in a manner sensitive to cultural heritage matters, whereas the native title party argue that Gamboola's proposal to exclude Zone 4 from the exploration program is irrelevant as it is merely a bare statement of intention and unenforceable in the event of non-compliance.

[80] As discussed above in the context of s 237(a), evidence regarding the grantee party's intentions is relevant to the predictive assessment the Tribunal is required to undertake in determining the risk of interference. The weight that may be attributed to such evidence, however, will depend on the circumstances of the particular matter. Where evidence suggests the grantee party intends to exercise the rights conferred by the proposed future act in a particular manner, that evidence cannot simply be dismissed on the basis that intentions do not always translate into action (see *MNR v FMG Pilbara* at [70]). However, in circumstances where the grantee party's intentions include an offer to exclude a site of particular significance from an existing exploration program, it may be appropriate to have regard to whether such an undertaking is enforceable (see *Gilla v Monument Murchison* at [105]-[112]).

How much weight can be given to the Native Title Protection Conditions?

[81] The notice issued by the State outlining its intention to grant the proposed permit specifies that the permit will be subject to the NTPCs. Gamboola and the State submit that the protection offered by the NTPCs will mean the grant of the proposed permit is

unlikely to interfere with areas or sites of particular significance to the native title holders. The native title party, on the other hand, contend that the NTPCs should be given little weight and the presumption of regularity should not be relied upon to support a finding that the expedited procedure applies to the grant of the proposed permit.

[82] The native title party pursue this argument on two grounds. First, they say the NTPCs do not take account of specific cultural protocols that apply to areas of country within the proposed permit, such as the requirement to seek permission, prohibitions against disturbing traditional country, and existence of cultural sanctions arising from a failure to observe traditional law and custom. Second, the native title party contend that the NTPCs are ineffective in the absence of a regime of auditing by the State to ensure compliance with the conditions.

[83] The NTPCs are a standard set of conditions that address cultural heritage management and provide processes for inspections, notice requirements and administrative payments. It is a condition of the NTPCs that exploration activities must not be carried out in an area if they are likely to interfere directly with community or social activities or sites of particular significance, or are likely to involve major disturbance to the land or waters concerned, except in accordance with the NTPCs. This is illustrative of the purpose of the NTPCs, which are designed to address and limit the risk of interference or disturbance of the kind mentioned in s 237.

[84] To the extent the native title party's first ground raises possible limitations in the way the NTPCs deal with certain kinds of interference or disturbance, it does not necessarily affect the weight the Tribunal may attribute to them. The Tribunal's task is to evaluate the risk of interference. This requires the Tribunal to identify the apprehended interference and determine, having regard to all the circumstances, whether there is a real risk of interference. Part of that task is to assess whether, in the circumstances, the relevant site protection regime will adequately address the identified risk. While the Tribunal is entitled to give weight to the protective regime, it must consider each case on its own facts (see *Cherel v Faustus Nominees* at [81]–[91]).

[85] As to the second ground, the native title party identify several alleged deficiencies in the enforcement of the NTPCs. First, the native title party submit that the State's policing of compliance with the NTPCs is ineffective. Second, they contend that the

procedural mechanisms for responding to activity notices, attending meetings and seeking enforcement action in the Land Court presuppose the ongoing support of a representative body or legal representative, and place the native title party at risk of an adverse costs order, which serves as a disincentive to seek compliance in that forum.

[86] In terms of the enforcement issue, the native title party rely on the evidence of Mr Ross concerning the Olkola People's previous experience with mining companies operating in the area. In his affidavit, Mr Ross states that Olkola people have seen 'a lot of exploration permits issued over our Country' but have not been 'involved in any exploration or mining activity until the last 12 months'. Mr Ross says the State 'does not keep a close watch on what the mining companies are doing' such as whether notices are being sent to native title parties in relation to exploration activities. He cites the example of a complaint Olkola Aboriginal Corporation made to the State about a mining company that held nine exploration permits and 19 mining leases in Olkola country in respect of which they had not received any activity notices. Mr Ross says the company retained the permits and was subsequently issued a further permit, notwithstanding the complaint.

[87] In response to these criticisms, the State relies on the affidavit of Dale William Leathbridge, a Senior Project Officer, Field and Land Access, at the Department of Natural Resources, Mines and Energy ('DNRME'). Mr Leathbridge is responsible for administering the process that deals with potential non-compliance with the NTPCs and complaints received from 'Notified Native Title Parties' (as that term is defined in the NTPCs).

[88] Mr Leathbridge states that DNRME's approach to addressing potential non-compliance with the NTPCs is set out in the Operational Policy Administrative Compliance tools. According to Mr Leathbridge, DNRME takes the following steps in applying that policy:

(a) DNRME receives advice or a complaint from a Notified Native Title Party of potential non-compliance with the NTPCs;

(b) if required, DNRME requests further specific details from the Notified Native Title Party as to the potential non-compliance by the explorer;

(c) DNRME contacts the explorer regarding the potential non-compliance and advises the Mineral Assessment Hub so that all applications, renewals and transfer can be placed on hold. If the response from the explorer is unsatisfactory, DNRME issues an information notice and provides the explorer with 20 business days to respond;

(d) if the response from the explorer is again unsatisfactory, DNRME issues a show cause notice and provides the explorer with 20 business days to respond. If the matter is resolved at any time, DNRME contacts the Notified Native Title Party for confirmation;

(e) upon confirmation that the matter is finalised, a notation remains on the register;

(f) if the matter is not resolved, DNRME may proceed to either cancel the permit or impose a penalty.

[89] Mr Leathbridge deposes that, as of December 2017, the State has received approximately 23 notices from Notified Native Title Parties regarding potential non-compliance in relation to 19 explorers. Of those notices, DNRME has resolved six of those matters by adopting the procedures described in the preceding paragraph and two permits have been cancelled due to non-compliance. Mr Leathbridge states that a further four of the notices relate to permits that are no longer current, meaning the State was unable to pursue the complaints; however, in each case a notation remains on the register and can be considered in any future dealings lodged by the explorer.

[90] In relation to the specific example cited by Mr Ross, Mr Leathbridge states that he is aware of only one instance of non-compliance reported by the Olkola Aboriginal Corporation. In that matter, Olkola Aboriginal Corporation notified DNRME via email in September 2016 of its concern that the company was either not meeting its legal obligations in relation to notification and engaging with traditional owners on cultural heritage or not undertaking work on the tenements in accordance with its requirements under the *Mining Resources Act*. Annexed to Mr Leathbridge's affidavit is a copy of the email, which attached a letter the Olkola Aboriginal Corporation sent to the company outlining its concerns. The letter also says it encloses an invoice for administration costs payable to Olkola Aboriginal Corporation, though it appears the invoice was not attached to the email.

[91] In response to that email, an officer at DNRME contacted the Olkola Aboriginal Corporation later the same day to confirm she had forwarded it to the Cultural Heritage Coordinator at the Department of Aboriginal and Torres Strait Islander Partnerships ('DATSIP') and the Manager, Mineral Assessment at DNRME. The officer also asked the Olkola Aboriginal Corporation to provide copies of any outstanding invoices, to which it replied that their concerns related to the non-issue of Exploration Activity Notices under the NTPCs rather than the payment of invoices.

[92] In November 2016, the officer sent a further email seeking an update on the status of the matter, to which the Olkola Aboriginal Corporation replied that it had met with the company and offered them the opportunity to address its board of directions. The Olkola Aboriginal Corporation also reiterated its concerns about the company's compliance with permit conditions, though I note the concerns related to the fact the company had not undertaken any exploration activity on the granted permits, which it appeared to accept. The Olkola Aboriginal Corporation also outlined a range of matters which, in its view, established that it was not in the public interest for the company to hold or be issued permits under the *Mineral Resources Act*. It requested the Minister revoke the company's existing mining leases and reject applications to renew its existing exploration permits.

[93] In February 2017, the Olkola Aboriginal Corporation emailed DNRME to report that the company had not made the required administrative payments under the NTPCs and requested they 'enforce the requirement for mining proponents to pay administration fees in accordance with the NTPCs'. It also sought an update on its requests that the Minister revoke the company's existing mining leases and not renew its existing exploration permits or issue further tenements. In March 2017, a DNRME officer emailed the Olkola Aboriginal Corporation to advise he had received advice the fees had been paid and ask them to confirm whether the payments had been made. The Olkola Aboriginal Corporation confirmed payment of the fees but requested a response to the other issues it had raised. Following further correspondence between the Corporation and DNRME, Mr Leathbridge provided a response to those issues in June 2017.

[94] Rather than demonstrate the failure of the NTPCs as a regulatory mechanism, the example demonstrates the process that the State has in place for responding to

complaints of non-compliance with the NTPCs. DNRME referred the complaint to the relevant departmental officers and took steps to investigate the complaint. In the end, it is apparent the Corporation accepted that no exploration activity had taken place in breach of the NTPCs and, though no action appears to have been taken against the company, the administrative payments were eventually paid. Although the Corporation raised a number of issues concerning the company's compliance with permit conditions, Mr Leathbridge's response of June 2017 suggests those issues would be subject to a separate assessment process and past compliance with permit conditions would be considered as part of that assessment process. In my view, the example does not support the conclusion that the State's role in ensuring compliance with the NTPCs is ineffective.

[95] The example also serves to illustrate the general point that, no matter how robust the regulatory regime, it may not be sufficient to prevent all contraventions. That does not mean the Tribunal should not give any weight to that regime. As the Tribunal observed in *MNR v Zenith Minerals* at [44], the effectiveness of a regulatory regime does not necessarily require universal compliance by enforcement of the measures on which it relies. The risk of interference will depend in each case on the conduct of the grantee party and the Tribunal must deal with each matter on its own facts.

[96] In terms of the native title party's submissions regarding the legal and administrative burden involved in addressing non-compliance with the NTPCs, I acknowledge that the NTPCs require the native title party to take certain actions in response to activity notices and other actions initiated by the explorer. The costs associated with administering these processes is recognised in cl 8 of the NTPCs, which requires the explorer to make administrative payments to a body nominated by the native title party. It is worth noting that an agreement dealing with matters relating to Aboriginal cultural heritage would impose similar obligations. The native title party is under no obligation to enter such an agreement, but nor does it have right of veto over future development.

[97] The example discussed above demonstrates that, unlike a contractual agreement, there are avenues for the native title party to seek enforcement by the State rather than through a formal legal process. Although the parties may have recourse to the Land Court in relation to a variety of matters arising under the NTPCs, the Land Court's role is not to enforce compliance with the NTPCs. That responsibility rests with the State, in

accordance with the processes outlined in the relevant policy. While I accept the NTPCs presuppose a certain level of administrative effort on the part of the native title party, I do not consider this renders them ineffective as a regulatory mechanism.

How much weight can be given to other aspects of the regulatory regime?

[98] In support of the application of the expedited procedure, the State submits that Queensland's mining, environmental and cultural heritage regimes provide layers of cultural heritage and environmental protection for mining activities, It says the Tribunal has previously observed that these regimes constitute a 'protective framework', citing the Tribunal's remarks in *Cameron v Hoolihan* at [38]. Similarly, Gamboola contends that the NTPCs do not operate in isolation from its broader obligations to comply with its duty of care under the *Aboriginal Cultural Heritage Act 2003* (Qld). Furthermore, Gamboola submits that it will be subject to standard environmental compliance conditions and is required to consult with EHP in relation to the Olkola Nature Refuge.

[99] The native title party maintain that the regulatory regime established under the *Aboriginal Cultural Heritage Act* and administered through the Cultural Heritage Duty of Care Guidelines ('the Guidelines') and the NTPCs would not provide sufficient protection against the impact of the proposed exploration on its cultural heritage. In particular, they point to alleged deficiencies in the Guidelines that render them inadequate to protect against the risk of interference and prevent recourse through the *Aboriginal Cultural Heritage Act* in the event of damage to cultural heritage. The native title party also contend that Gamboola's obligations under the *Mineral Resources Act* and the *Nature Conservation Act 1992* (Qld) are irrelevant as they involve separate and distinct statutory processes.

[100] In relation to the alleged shortcomings of the Guidelines, the native title party refer to the issues paper released by DATSIP in April 2017 as part of a review of the Guidelines. The stated purpose of the issues paper was to highlight, based on an analysis of submissions from interested parties, key themes and issues for developing revised Guidelines with the aim of defining 'reasonable and practicable measures to avoid or minimise harm to Aboriginal cultural heritage'. The paper identifies three key issues that, in DATSIP's view, need to be considered in developing a new version of the Guidelines, namely: how to categorise activities; how to assess the risk of harm

associated with an activity; and dispute resolution processes where parties are unable to reach agreement.

[101] In terms of how the Guidelines categorise activities, the issues paper notes that one of the main criticisms of the current Guidelines was the assumption that an activity proposed to be undertaken on an area that has previously been subject to significant ground disturbance is unlikely to harm Aboriginal cultural heritage. The paper also notes that many submissions were critical of how the Guidelines define categories of activity, observing that the definitions are unclear and overlap in certain circumstances. On the issue of risk assessment, the paper observes that submissions 'highlighted the limited knowledge of many land users regarding the identification of Aboriginal cultural heritage' and proposed that revised Guidelines 'require land users to document their approach to complying with the duty of care in any case where further assessment is not considered necessary'. As to dispute resolution processes, the paper states that numerous submissions focussed on 'the uncertainty created when agreement cannot be reached about suitable management processes'.

[102] The paper also identifies a range of matters that were raised in the submissions but deemed be to outside the purpose and scope of the Guidelines or outside the role of the DATSIP's Cultural Heritage Unit and its current administrative authority. These include the standardisation of fees, rates and timeframes for cultural heritage assessment and management processes; extending the regulatory role of the Cultural Heritage Unit; education and awareness; and compliance enforcement. The paper notes that, to the extent these matters relate to the current legislative framework, DATSIP would not be pursuing those suggestions and recommendations but would provide stakeholders with information about future initiatives relating to improving the effectiveness of the legislation. I note the paper does not discuss the NTPCs or their interaction with the Guidelines.

[103] The native title party also refers to the submissions made by the Cape York Land Council and the Olkola Aboriginal Corporation. Among the matters raised in those submissions, the native title party note in particular the submission that the Guidelines do not effectively deal with the protection of Significant Aboriginal Areas that do not involve physical markings. Gamboola notes that clause 1.5 of the Guidelines specifically provides that an area does not have to contain 'markings or other physical

evidence indicating Aboriginal occupation or otherwise denoting the area's significance for the area to be protected as a significant Aboriginal area'. However, the native title party submits that, although Aboriginal cultural heritage is defined in this way, the processes described under Part 2 of the Guidelines and the NTPCs do not contemplate sites that lack physical markings.

[104] I am not persuaded the processes established under the Guidelines and the NTPCs do not provide adequate protection in relation to sites that do not feature markings or other physical evidence. Subject to the matters addressed in the issues paper regarding activities in areas that have previously been disturbed, it is not clear in what way the processes outlined in the Guidelines fail to take account of these sites. Similarly, I note that the NTPCs provide for a process for the notification of proposed exploration activity and, if necessary, field inspection. The native title party has not identified how these processes are deficient in respect of sites that do not have physical markings, particularly as the inspection processes contemplate the involvement of a field inspection team nominated by the native title party.

[105] The native title party also argue that less weight should be given to the site protection regime because the Guidelines state that a person is taken to have complied with the statutory duty of care if he or she is acting in compliance with the NTPCs. This provision is also found in s 23(3)(a)(v) of the *Aboriginal Cultural Heritage Act*. The issue is taken up in the submissions of the Cape York Land Council and the Olkola Aboriginal Corporation, who assert that, if cultural heritage is harmed, the land user should still be prosecuted whether or not they have complied with the Guidelines. I accept that this perhaps raises legitimate questions as to whether the Guidelines and the *Aboriginal Cultural Heritage Act* provide any additional protective effect beyond the processes outlined in the NTPCs. However, I also acknowledge Gamboola's submission that, if an explorer fails to comply with the NTPCs, it will lose that protection and may be exposed to penalties. In my view, rather than detract from the efficacy of the site protection regime generally, this adds further weight to the protective effect of the NTPCs as it provides an incentive for compliance.

[106] In relation to other approval processes under the *Mineral Resources Act* and the *Nature Conservation Act*, the native title party relies on the decision of *Walker v Noosa Shire Council*. In that case, the Full Court of the Queensland Supreme Court overturned the

decision of the council to refuse planning permission based on the fact the appellant had yet to obtain the consent of other authorities. In my view, that decision is not relevant to the present inquiry. The Tribunal must undertake a predictive assessment of the likelihood that the proposed future act will cause interference or disturbance of the kind contemplated by s 237. The assessment is contextual and the Tribunal is entitled to have regard to the regulatory environment to which the future act will be subject. In undertaking that assessment, the Tribunal operates on the assumption that, in the absence of evidence to the contrary, the Government party will exercise its powers properly and according to law (see *Murray v Money* at [27]-[62]).

Is the grant of the permit likely to interfere with areas or sites of particular significance?

[107] As I have already noted, the native title party's contentions are principally concerned with the risk of interference with the *Alkura* story place and the mound springs area. I will deal with those contentions first before moving on to consider the risk of interference with other sites of particular significance identified in the evidence.

[108] The native title party contend that the proposed exploration activities are prohibited under established cultural rules regarding access to and use of the Crosbie area and the *Alkura* story place in particular. They also contend that the potential impact to the site is not restricted to exploration activity in the immediate area of the mound springs but in other parts of the proposed permit area that are connected to the subterranean hydrology of the mound springs.

[109] According to Mr Ross, there are established laws and customs about what can and cannot be done in the mound springs area. In particular, he states that Olkola people 'are not allowed to disturb the ground there, and we are not allowed to let anyone else do so either'. This includes taking stones from the area. Mr Ross also refers to the need to seek permission before entering the Crosbie area, though it is not apparent the area differs in this respect from other places in Olkola country.

[110] In terms of the effect of drilling in areas outside the mound springs, the native title party relies on the evidence of Dr Shellberg on the relationship between the mound springs and the underlying hydrology of the Crosbie area. Specifically, Dr Shellberg states that a single artesian aquifer with 'similar and connected recharge areas' underlies both

the Crosbie Creek catchment and the Coleman River catchment, so that disturbance to the regional aquifer by drilling or pumping could 'disrupt the groundwater flow paths that feed the mound springs systems'. This was the basis of the Crosbie Station Report's recommendation to place a permanent ban on deep groundwater extraction from Crosbie Station and surrounding areas.

[111] In its negotiations with the native title party, Gamboola offered to exclude the Zone 4 target area from its exploration program pending further negotiations with the native title party. Gamboola refers to the offer in its contentions and the letter to the native title party containing the offer is annexed to Mr Dugmore's affidavit; however, I note that Gamboola has not expressly stated that the offer remains open and it is not specifically addressed in Mr Dugmore's affidavit. I also note that, according to the map annexed to Mr Dugmore's affidavit, a small section of the Paradise target area overlaps the northern section of the *Alkura* story place.

[112] In the circumstances, I am inclined to give less weight to Gamboola's proposal to avoid the mound springs areas, particularly in the absence of a binding agreement or enforceable undertaking. I also have significant doubts as to whether the NTPCs would provide sufficient protection against the risk of interference with the mound springs area. Although the NTPCs would require Gamboola to notify the native title party of any proposed exploration activities within the mound springs area, Gamboola would only be required to arrange a field inspection if the exploration activity notice were to include activities that are not 'Agreed Exploration Activities'. As Schedule 1 of the NTPCs defines 'Agreed Exploration Activities' to include 'sampling by hand methods' such as grab sampling and rock chip sampling, Gamboola could undertake those activities in compliance with the NTPCs without a field inspection. Given that compliance with the NTPCs is deemed compliance with the statutory duty of care, I do not consider that any further weight can be given to the protective effect of the *Aboriginal Cultural Heritage Act*.

[113] In terms of the effect on the underlying hydrology, Gamboola notes that the standard environmental conditions which apply to exploration projects set out requirements in relation to drilling in artesian or non-artesian aquifers. These conditions are also set out in the affidavit of Ms Catherine Ellen Birt, manager of the customer service team at EHP. In compliance with those conditions, Mr Dugmore states that Gamboola intends

to ‘pre-collar’ drill holes that are likely to intersect artesian aquifers, which will enable them to carry out ‘well control procedures’. According to Mr Dugmore, these measures will prevent contamination, interconnection between aquifers, flow of pressurised water to the surface, and the degradation of natural hydrostatic conditions. Mr Dugmore also states that Gamboola intends to decommission drill holes by backfilling them with cement grout to prevent the flow of water to the surface or other aquifers.

[114] The evidence of Dr Shellberg suggests that, while Gamboola’s proposal to pre-collar drill holes would mitigate to some degree the risk of disturbing the groundwater flow paths, the risk is still significant. Dr Shellberg says he ‘does not accept the contention that the installation of precollared, pressure cementing casing will, to a high degree of confidence, control well pressure and prevent interconnection between aquifers, the flow of pressurized water to the vadose zone or surface … or degradation of natural hydrostatic pressures’. He notes there is ‘ample scientific evidence’ which demonstrates that case bore holes are not entirely effective and there would be ‘a high level of risk of failure at multiple sites if these techniques were applied to dozens or hundreds of exploratory bore holes’ across the region and within the proposed permit area.

[115] In light of the expert evidence of Dr Shellberg, I am satisfied there is a real risk that drilling in the proposed permit area will have an adverse effect on the mound springs. Although EPH’s view, expressed in Ms Birt’s affidavit, is that the standard environmental approval conditions will adequately manage the risks posed to the environment from the proposed exploration activity, I must make my own assessment on the material before me. I accept that the standard conditions will provide some measure of protection. I also accept that Gamboola’s proposal to pre-collar drill holes will reduce the risk of disruption to the underlying hydrogeology. However, given the significance of the mound springs to the Olkola People and Dr Shellberg’s evidence regarding the effectiveness of the proposed protection measures, I am satisfied there is a real and not insignificant risk of interference with the mound springs.

[116] I am also satisfied there is a real risk of interference with the matchwood gravesites, for similar reasons as those expressed above. While the NTPCs would require Gamboola to notify the native title party of any proposal to carry out exploration activity in the area around Emily Creek, it would only be required to arrange a field inspection if the proposed exploration activities included activities that are not

'Agreed Exploration Activities'. Considering the nature of these sites, there is a real risk that activity of the kind that falls within the definition of 'Agreed Exploration Activities' may result in interference. Given the evidence does not specifically identify the location of each site, it would likely be difficult for Gamboola to avoid them, particularly in light of Mr Ross' evidence that they are difficult to recognise.

[117] I have reached a different conclusion in relation to the Crocodile Story Place and the Lancewood Country. Although the Crocodile Story Place is also a burial site, the native title party has specifically identified the site and it is marked on the map annexed to the affidavits of Mr Ross and Mr Burns. There is nothing in the evidence to suggest that the NTPCs will not provide sufficient protection against interference with the site. In relation to the Lancewood Country, it appears the main concern is that Gamboola would knock down the trees. Though Mr Ross states that the Lancewood Country 'needs to be left alone' and that Olkola people do not go hunting there, I do not take this to mean that unauthorised access to these areas would amount to interference in accordance with traditional law and custom. In the circumstances, I am satisfied the NTPCs would provide adequate protection.

[118] In light of my findings regarding the mound springs and the matchwood gravesites in the area around Emily Creek, I am satisfied the grant of the proposed permit will involve a real risk of interference with areas or sites of particular significance to the Olkola People.

Major disturbance to the land and waters concerned: s 237(c)

[119] The issue of whether the proposed permits are likely to involve, or create rights whose exercise is likely to involve, major disturbance requires the Tribunal to make an evaluative judgment by reference to the expectations of the whole Australian community, including Aboriginal people (see *Little v Oriole Resources* at [52]−[54]).

[120] The particular concerns of the Aboriginal community, including matters such as community life, customs, traditions and cultural concerns, are relevant to that evaluation, provided they relate to the actual physical disturbance arising from the exercise of rights granted or created by the proposed future act (see *Dann v Western Australia* at 394, 401 and 413; *Rosas v Northern Territory* at [84]).

[121] In evaluating the disturbance, the Tribunal is entitled to have regard to the context of the proposed grant, including previous land use, the characteristics of the relevant land and waters and the relevant regulatory regime.

What are the characteristics of the permit area?

[122] The native title party note that the area is wholly within the grant made under the *Aboriginal Land Act* to the Olkola Aboriginal Corporation as trustee of the land for the benefit of Aboriginal people particularly concerned with the land and their ancestors and descendants. They also note that the proposed permit partly covers the Alkura Section of the Olkola Nature Refuge created pursuant to the *Nature Conservation Act* following the conservation agreement entered into between the Olkola Aboriginal Corporation and the State in December 2014.

[123] The native title party also rely on the Crosbie Station Report in support of the area's cultural and environmental characteristics. The report states that the area contains 33 regional ecosystems across six land zone types, three of which are classified as 'of concern' for vegetation and biodiversity. It also notes the importance of the associated wetlands as 'a focal point for wildlife' and states that the Crosbie area and surrounding stations are 'a high priority area for conservation of physical, biological and cultural diversity'. Among the threats identified by the report are potential weed invasion, gully erosion along roads and tracks, disturbance from cattle and pigs, altered fire regimes, uncontrolled recreation and potential impacts of surface and groundwater pumping on mound springs, creeks and lagoons.

[124] The Crosbie Station Report highlights in particular the environmental and cultural concerns associated with the mound springs. The report notes that the mounds springs are 'uncommon but not unique on Cape York' and, while similar to those reported in other parts of the artesian basin, are 'probably the better developed ones known to date' on the peninsula. However, the report elsewhere notes that the mound springs areas is unique in that it is found on alluvial floodplain soils but created by alkaline and slightly saline spring water emerging from either Tertiary and Mesozoic aquifers of the Great Artesian Basin. The report recommends a range of land management actions at Crosbie Station, including: the banning of deep groundwater extraction from Crosbie Station and the surrounding areas; obtaining domestic and stock water from surface water sources;

excluding stock from the mound spring area and surrounds through continued destocking or fencing; preventing erosion from roads, overgrazing or other land uses; and initiating an aggressive weed mapping, management and eradication program.

[125] The affidavits of Mr Ross and Mr Burns also address the area's cultural significance. Mr Ross states that the Crosbie area 'is particularly important to me and my family' and says he needs to 'keep the cultural story alive' and 'protect my people by protecting their story sites and upholding our law'. He also refers to conditions on accessing country, including the need to follow rules about particular places and activities. Mr Burns also states that Olkola people have strict laws and customs about accessing Olkola country. He notes there are 'a lot of important cultural places on Dingo and Kan Kan Country' and says it is important that people who visit the country do so with permission and 'access Country the right way'. Mr Burns states that observing these rules is 'serious and will affect all of our lives'.

Is the grant of the permit likely to result in major disturbance to the land and waters?

[126] I acknowledge the particular environmental and cultural characteristics of the proposed permit area, as described in the Crosbie Station report. I also acknowledge the risks identified in the report, such as potential for weed invasion and erosion along roads and tracks. While I have had regard to those characteristics and the associated risks, I do not consider they justify a finding that the proposed exploration activities are likely to result in major disturbance to the land or waters, at least to the extent the activities do not involve exploratory drilling.

[127] In the case of drilling, I have given significant weight to the expert evidence of Dr Shellberg and other evidence that testifies to the cultural significance of the mound springs. Dr Shellberg states that, in his opinion, drilling in the proposed permit area would pose a high risk of damaging the Mesozoic or Tertiary aquifers that underlie the region and of disturbing aquifer pressures and water flow to discharge areas such as the mound springs, as well as creeks, wetlands and associated ground water-dependent ecosystems. Although pre-collaring would mitigate this risk to some degree, Dr Shellberg's view is that there will still be a significant risk to the mound springs. The other parties have not sought to contradict Dr Shellberg's opinion, other than to refer to the relevant environmental conditions to which the proposed permit would be subject.

[128] I have had regard to those conditions and the overarching environmental protection regime, as outlined in the affidavit of Ms Birt. I accept they will go some way to reducing the risk of disturbance to the mound springs. However, there remains a real risk that exploratory drilling will disturb the underlying hydrology of the area, which will in turn affect the mound springs. This risk is particularly significant given the Olkola People's cultural concerns about the effect of drilling on the mound springs.

[129] In light of the risk of disturbance to the mound springs associated with exploratory drilling, I find that the grant of the proposed permit is likely to result in major disturbance to the land and waters concerned.

Determination

[130] The determination of the Tribunal is that the grant of exploration permit EPM 26190 to Gamboola Resources Pty Ltd is not an act attracting the expedited procedure.

Mr JR McNamara
Member
2 March 2018