NATIONAL NATIVE TITLE TRIBUNAL

Michael Ross & Others on behalf of the Cape York United Number 1 Claim v Lithium Australia NL and Another **[2018] NNTTA 11 (2 March 2018)**

Application No: **QO2016/0047, QO2016/0048, QO2016/0049**

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

- and -

IN THE MATTER of an inquiry into expedited procedure objection applications

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

(native title party)

- and -

Lithium Australia NL

(grantee party)

- and -

State of Queensland

(Government party)

DETERMINATION THAT ONE OF THE ACTS IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE AND TWO OF THE ACTS ARE NOT ACTS 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 attracted – 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)

Nature Conservation (Wildlife) Regulation 1994 (Qld)

Environmental Protection Act 1994 (Qld)

Environmental Protection and Biodiversity Conservation Act 1986 (Cth)

Cases:

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*’)

FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation RNTBC [2014] FCA 1335 (‘*FMG Pilbara v Yindjibarndi Aboriginal Corporation*’)

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*’)

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

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*’)

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
Representatives of the grantee party:	Mr Shannon McMahon, McMahon Mining Title Services Pty Ltd Mr Derrick Kettlewell, Lithium Australia NL
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 Lithium Australia NL and Another **[2018] NNTTA 11**

This matter concerned the proposed grant of exploration permits EPM 26253, EPM 26254 and EPM 26257 by the State of Queensland to Lithium Australia NL ('Lithium'). The National Native Title Tribunal determined the grant of EPM 26253 is an act attracting the expedited procedure, but the grants of EPM 26254 and EPM 26257 are not. 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 Gamboola Resources Pty Ltd and Another* [2018] NNTTA 11).

The objection applications

In June 2016, the State gave notice of its intention to grant the permits under the *Mineral Resources Act 1989* (Qld), and included a statement that it considered the grants to be acts 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 [78], [89].

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, Lithium proposed to allow an Indigenous Ranger to accompany field staff when on site; avoid sites of significance identified by the native title party on a map; and engage with the native title party to discuss appropriate cultural awareness training. The Tribunal noted it should not dismiss such evidence on the basis that intentions do not always translate into action [73]. It found Lithium was sincere in its stated intentions and aware of its obligations under the *Aboriginal Cultural Heritage Act 2003* (Qld), noting it proposed the measures not only in the context of negotiations but also in a sworn affidavit by one of its officers [105].

Basis for determination

The Tribunal found the evidence in this matter established it was likely the proposed grants of EPM 26254 and EPM 26257 would interfere with the social and community activities of the native title party per s 237(a), despite the application of the State's regulatory regime and

Lithium's stated intentions. The following factors, which the Tribunal found were established on the evidence, were significant in these conclusions:

- The native title party conducts extensive cultural tourism operations and land management activities, such as those associated with a carbon abatement project and cattle-mustering program, on the 'Alwal Recovery Area' on EPM 26254 and EPM 26257. The area covered by both the 'Alwal Recovery Area' and the permits accounts for a significant portion of Aboriginal freehold land and is a key focus for the native title party's activities [45];
- The timing and location of Lithium's exploration activities (see [28]−[35]) indicates there would likely be a significant overlap with these activities of the native title party [46];
- While the NTPCs would require Lithium to notify the native title party of all proposed exploration activities, the Tribunal was not satisfied this process would ensure the proposed exploration would not interfere with these activities [46].

In contrast, the Tribunal concluded activities associated with cultural camps and the teaching of language and culture, which appeared to occur less frequently in those areas, would be sufficiently preserved by the notification requirements of the NTPCs [42]. The Tribunal also found the native title party's activities were not conducted over the area of EPM 26253 with such an intensity that the grant of that permit would likely result in interference per s 237(a) [46].

The Tribunal found an area associated with a Dingo Story and matchwood burial sites were located on the proposed permits and were of particular significance to the native title party [58], [62]. However, it was satisfied the State's regulatory regime, together with Lithium's sworn intentions to adopt measures to avoid interference with significant areas or sites, indicated interference per s 237(b) was not likely [105]−[107].

Final comments

Despite there being no obligation to negotiate when the expedited procedure is notified, it appears Lithium voluntarily engaged in a constructive way with the native title party, and the native title party engaged with Lithium 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 the conduct of community and social activities and 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 grants 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 permits EPM 26253, EPM 26254 and EPM26257 to Lithium Australia NL ('Lithium') under the *Mineral Resources Act 1989* (Qld). In notifying its intention to grant the proposed permits, the State included a statement that it considers each 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 negotiations between the State, Lithium and the registered native title claimants for these areas as would otherwise be required under the right to negotiate provisions of the *Native Title Act*.

[2] The proposed permits are situated in the Shire of Cook on Cape York Peninsula. EPM 26253 comprises an area of 258 square kilometres, located approximately 65 kilometres south of Coen, whereas EPM 26254 and EPM 26257 comprise areas of 228 square kilometres and 302 square kilometres respectively, and are both approximately 125 kilometres north of Laura. All three of the proposed permits are located within the external boundaries of the Cape York United Number 1 claim, while a small portion of EPM 26254 is also situated in the Wik and Wik Way #4 determination area. I also note that large parts of EPM 26254 and EPM 26257 are 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] Each of the notices 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 applications with the Tribunal objecting to the assertion the expedited procedure applied to the grants. 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 objections, President Raelene Webb QC appointed me to constitute the Tribunal for the purpose of conducting an inquiry into the objections and determining whether the proposed permits attract 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 the Tribunal is 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 applications on behalf of the members of the claim group particularly concerned with the land and waters the subject of the proposed permits, 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 and the proposed hearing

[8] Following a period of negotiations between the parties, I issued directions for the inquiry on 4 August 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, Fred Coleman and Jack Lowdown. All three deponents are members of the Cape York United Number 1 claim group, with Mr Ross being one of the individuals comprising the registered native title claimant. Mr Ross and Mr Lowdown are also directors of the Olkola Aboriginal Corporation. Mr Ross states that his tribe is Olkola and he is part of the Kurrumbila People. Mr Lowdown deposes that he is an Olkola person and speaks for the country around Old Dixie Homestead. Mr Coleman states that he is part of the Dingo People and is one of the main people to speak for the area within EPM 26253. I accept that Mr Ross, Mr Lowdown and Mr Coleman have authority to speak on behalf of the native title party for the land and waters within the proposed permit areas.

[10] Lithium relies on the affidavit of Derrick Kettlewell in support of its statement of contentions. Mr Kettlewell is a senior geologist at Lithium whose role involves the preparation and implementation of the company's exploration plan for the proposed permits and his affidavit outlines its proposed exploration activities. The State also provided its own statement of contentions and associated documents in reply to the native title party.

[11] The native title party, exercising its right of reply, then provided a further statement of contentions and other documents including the affidavit of Mr Phillip James Duffey, whom Olkola Aboriginal Corporation has employed 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

and his affidavit provided further detail of the activities managed and facilitated by the Olkola Aboriginal Corporation.

[12] On 23 November 2017, the Tribunal sought parties' views on whether the matter could be determined on the papers, as opposed to a hearing. In response to that request, the native title party wrote to the Tribunal requesting that a hearing take place in either Cairns or Cooktown. The request was made on the basis that cultural evidence in the affidavits of the native title holders was best appreciated orally given the cultural sensitivity of the information and the sites of significance referred to in those documents. The native title party also submitted that the Tribunal should hear from Olkola rangers and other people involved in the monitoring and study of the golden-shouldered parrot.

[13] I convened a listing hearing to consider those issues on 29 November 2017. At the listing hearing, counsel for the native title party explained that a hearing was required to allow proper evaluation of the existing evidence rather than bring new evidence. Cooktown was proposed as the preferred location due to its convenience for the native title holders. Counsel for the State maintained that the matter could be determined on the papers, while Lithium's view was that the written material would suffice. At the conclusion of the listing hearing, I gave leave for the State to provide further affidavit material to address issues raised in the native title party's reply and reserved my decision on whether the matter should proceed to a hearing.

[14] 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. After considering that material, I considered the matter could be adequately determined in the absence of the parties. As I noted in my reasons, s 151(2) of the *Native Title Act* requires the Tribunal to hold a hearing only if it appears that the issues for determination cannot be adequately determined in that way.

[15] 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)

[16] 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 or 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 areas?

[17] The affidavits of Mr Ross and Mr Lowdown 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 permits. 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.

[18] 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. He 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. 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.

[19] In his affidavit, Mr Ross states that the Olkola Aboriginal Corporation 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 areas'. Mr Duffey states at least 150 members are invited to the annual camp and there are plans to increase the frequency of these camps. He also states that other camps 'are held at least once a week on Olkola country, usually during the school holidays' and can include over 100 participants; however, it is not clear whether these more frequent camps are held once a week only during the school holidays or are also held at other times of the year.

[20] Mr Ross and Mr Lowdown state that the Olkola Aboriginal Corporation also runs cultural tours in the areas within EPM 26254 and EPM 26257. Mr Lowdown, who works as a tour guide, states that tourists are shown 'some of our important sites, and we show them some of the trees that we use for medicine, bush food and to make tools such as spears and boomerangs from'. According to Mr Lowdown, the tours 'go right through the EPM areas each time'. Mr Ross states that the Olkola Aboriginal Corporation currently undertakes six weeklong tours a year during the dry season and plans to increase the frequency of these tours. Mr Duffey states that Olkola Aboriginal Corporation has developed a five-year Tourism Plan for Olkola country, the indicative schedule for which would involve a total of 80 days per year from May to August.

[21] The evidence also suggests the Olkola Aboriginal Corporation carry on a range of land management activities over areas including the proposed permits. For example, Mr Duffey states that the areas within EPM 26254 and EPM 26257 are part of the recovery project for the golden-shouldered parrot (or *Alwal* in the Olkola language), which the Olkola Aboriginal Corporation carries out in partnership with Bush Heritage Australia (the map annexed to the affidavits of Mr Ross and Mr Lowdown depicts an area labelled the 'Olkola Alwal Recovery Area', which includes EPM 26254 and EPM 26257). According to Mr Duffey, the Olkola Aboriginal Corporation currently employs a full-time ranger who is dedicated to protection work and is engaged in activities such as surveying the recovery project area, placing monitoring cameras at identified nesting sites and undertaking 'storm burns' to protect the habitat of the golden-shouldered parrot. Olkola people are also involved in mustering cattle from these proposed permit areas to reduce the threat of damage to *Alwal* habitats and, according to Mr Duffey, plan to be engaged in mustering activity for up to a month between September and November.

[22] Another land management activity for which the proposed permit areas are used is the Olkola Ajin Early Season Burning Carbon Abatement Project. As part of this program, Olkola rangers carry out traditional patchwork burning following the wet season to prevent late season fires. Mr Ross states that rangers spend about a month engaged in this activity between the wet season and August or September and go onto country at other times of the year to fight late season fires. Mr Duffey states that Olkola's burning regime is carried out in accordance with its annual fire plan, which can change from year to year but usually requires burning to take place in the early dry season. According to Mr Duffey, the activities associated with the project, including storm

burns, are usually undertaken within 50 days but can take up to 180 days if there are wildfires. This presumably includes time spent on country fighting late season fires.

Are the activities community or social activities?

[23] The State contends that the activities described in the evidence of the native title party are similar to the responsibility for 'managing country' that is said to be distinguishable from 'community or social' activities of the kind which can be considered in the context of s 237(a). In drawing this distinction, the State relies on the Tribunal's decision in *Ngan Aak-Kunch v Glencore*.

[24] 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.

[25] In the present case, the affidavit material outlines a range of activities undertaken by 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.

[26] The operation of cultural tours by the Olkola Aboriginal Corporation is a possible exception. 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]). In the present case however, there are several reasons that justify characterising the cultural tours as a 'community or social' activity. First, the Olkola Aboriginal Corporation is a registered charity whose objects include advancing social or public welfare, advancing culture and promoting reconciliation. Second, the Olkola Aboriginal Corporation manages the land for the benefit of the Olkola People. Third, the cultural tours have been established with the aim of

providing employment for Olkola people and as a means of showcasing and protecting the cultural values of the area. For these reasons, I am satisfied that the cultural tours are a 'community or social activity' within the meaning of s 237(a).

What activities are Lithium likely to undertake on the permit areas?

[27] The activities Lithium intends to carry on under the proposed permits are outlined in the affidavit of Mr Kettlewell and its approved work programs, copies of which are provided by the State.

[28] Mr Kettlewell states that the exploration plan will take a staged approach beginning with desktop studies and target generation, followed by detailed geological mapping of prospective areas and geochemical sampling of rock chips, soil and stream sediment. He states that the target mineral is lithium and expects the company will use reverse circulation drilling to identify the width and depth of lithium mineralisation depending on the outcome of initial exploration. Mr Kettlewell states that the company will also assay for other elements, which may be the subject of additional geochemical sampling. According to Mr Kettlewell, the most likely areas of initial interest will be 'the contact zones between the Holroyd Group and the granite' within the proposed permit areas. These areas are marked on a map annexed to Mr Kettlewell's affidavit.

[29] The evidence of Mr Kettlewell is consistent with the approved work programs. The activities detailed in the first year of each program involve literature research and data compilation, aerial photography and interpretation, and geological assessment and reporting. The second year of each program contemplates remote sensing, mapping and sampling, and assay and metallurgical test work. The third year involves sample analysis using a portable XRF or x-ray fluorescence analyser, whereas years four and five are dedicated to reverse circulation drilling.

[30] Although Mr Kettlewell states he has yet to finalise Lithium's exploration plan, he anticipates that two people will be involved in mapping areas of interest identified during the desktop review, working on site between 10 and 14 days at a time. According to Mr Kettlewell, geochemical sampling will involve the removal of soil, rock chip and stream sediment samples from areas of interest by two people working on site between 10 and 14 days at a time using hand-held tools such as rock hammers or trowels. In each case, Mr Kettlewell anticipates that Lithium will access the area using existing tracks and by walking the land where there is no existing road or track. In terms of timing, Mr Kettlewell says he expects Lithium to conduct fewer than ten

visits in the first year and states it will not carry out work on the land between the months of December and March due to weather or between March and June due to the Alwal breeding season.

[31] 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'. In this regard, the native title party note the approved work programs anticipate reverse circulation drilling in year four, and give and refer to the statements made in Lithium's correspondence with the native title party that drill testing would initially involve a minimum number of wide-spaced drill holes followed by more intensive, closer-spaced drilling if successful.

[32] In determining whether the expedited procedure applies to the proposed permits, the Tribunal must undertake a predictive assessment of what is likely be done, rather than what could be done, as a result of their 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. The activities contemplated by Lithium are reasonably extensive. I acknowledge the company is primarily interested in the areas of contact between the Holroyd Group and granite and those areas are likely to be the focus of exploration. That said, the evidence suggests the desktop analysis and initial on-ground exploration activity is likely to shape the later stages of the program, meaning exploration may not be confined to those areas of interest.

[33] I have also had regard to Lithium's letter to the Cape York Land Council dated 22 March 2017, in which Mr Kettlewell outlines the company's exploration plans. Addressing the native title party's query about potential drill targets within the proposed permit areas, Mr Kettlewell states that 'no drill locations are possible until initial desktop target generation and detail[ed] geological mapping and geochemical sampling has been completed'. Mr Kettlewell goes on to state that, if drilling is required to better understand the commercial viability of any lithium mineralisation, Lithium anticipates that 'some clearing of vegetation for access and drill pad construction, leveling of drill pads, and the digging of sumps to contain possible groundwater may be required'. He also states that 'a more permanent camp' may be required depending on the local infrastructure.

[34] The native title party further submit that, because the approved work programs are not site-specific, the Tribunal should consider the impact on their community or social activities over the entire area of the proposed permits. In reply, Lithium submits that on-ground exploration activities are unlikely to be frequent or cover large portions of the proposed permit areas, so that any effect on community or social activities would be limited to the area where exploration is occurring at a particular time. Lithium also contends that the regulatory regime, including the Native Title Protection Conditions ('NTPCs'), provide a process whereby the native title party will have the opportunity to assess each site prior to the commencement of any proposed exploration activity.

[35] I have taken into account the fact that the exploration activities are likely to be intermittent and their immediate footprint at a given point in time is likely to be limited, although this may not necessarily be the case if a permanent camp is established. However, I accept that the activities could take place anywhere within the proposed permit areas, noting that Lithium will be required under the NTPCs to give notice to the native title party before commencing any exploration activities.

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

[36] The native title party argue that the grant of the proposed permits is likely to interfere directly with the carrying of the community and social activities in two ways. First, they contend that the proposed exploration activities will '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. Second, they submit that, due to

seasonal constraints, the exploration activities Lithium proposes to undertake are more likely to interfere with the community and social activities carried on by the native title holders.

[37] Lithium contends that the grant of the proposed permits would not entitle it to exclusive possession and there is limited evidence that the community and social activities carried on by the native title holders could not coexist with its exploration program. It argues that, given the temporary and localised nature of the proposed activities, the exploration program is unlikely to restrict or impair the carrying on of any community or social activities in a substantial manner. The State contends that the NTPCs would require Lithium 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] According to Mr Duffey, Olkola people believe that, if Lithium is allowed to undertake exploration activities on the proposed permit areas, it will detrimentally affect their spiritual connection to the land, the strength of their story places and their ability to transfer their language and culture to the next generation of Olkola People. In particular, Mr Duffey says Olkola people believe that, if the next generation 'cannot be shown Country with intact dreaming' and activities are allowed to occur that are 'not in line with their customs of use and access to Country' then this would 'harm their culture and the ways the Old People have passed down to them'. Mr Duffey also states that Mr Ross and other Olkola people have expressed to him their concern for the health and wellbeing of Olkola people if exploration proceeds, given the significance of the totems associated with the proposed permit areas.

[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 application 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] I acknowledge the Olkola People's belief that the grant of the proposed permit would diminish their culture to such a degree that it would affect their ability to pass on their knowledge to the next generation. I accept this belief is sincerely held. 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.

[42] In my view, any effect the proposed exploration will have on the Olkola People's spiritual connection to the land is unlikely to have a substantial effect on these activities. There are a range of factors that might influence any decision by the Olkola People to discontinue the language program and the cultural camps. Nor do I consider the proposed exploration is likely to interfere directly with the ability of 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 Lithium notify the native title party of any proposed exploration activity.

[43] In terms of interference with the other activities identified in the affidavit evidence, the native title party emphasise the fact they are seasonal in nature and tend to intensify

during the dry season. Mr Duffey states that any activity undertaken on Olkola land is 'dictated by seasonal rains and the ability to access Country'. He also notes that, as traditional wet season and dry season months are becoming less predictable, the Olkola People 'often have to operate on Country when windows of opportunity allow us to'. Because of this, the various cultural and land management activities need to be centrally coordinated and managed to ensure they can proceed despite the influence of seasonal factors. For example, Mr Duffey states that 'the slightest impact in our fire regime will in turn impact our golden-shouldered parrot project, our fencing projects and our ability to muster in the area. If the fire management has not occurred in an area, we won't be able to muster'.

[44] According to Mr Kettlewell, Lithium plans to visit the proposed permit areas to undertake mapping and geochemical sampling for 10 to 14 days for fewer than ten times a year. Due to weather conditions, Lithium does not intend to carry out work in the proposed permit areas and will suspend on-ground activity between March and June to account for the *Alwal* breeding season. The corollary is that on-ground exploration activity would be confined to the period between July and November. It is not clear whether or to what extent exploration activity would intensify if Lithium were to identify targets for drilling. On the other hand, Mr Duffey states that Olkola rangers spend up to a month carrying out patchwork burning between the wet season and August or September, up to three weeks in the late dry season or early wet season undertaking storm burns, and a further month engaged in cattle mustering between September and November. He also notes that the first year of Olkola's tourism plan contemplates a schedule of cultural tours running for a total of 80 days from May to August, whereas about 15 weeks are set aside for activities associated with the *Alwal* recovery project.

[45] I note that some of the land management activities such as those associated with carbon abatement project and the cattle-mustering program also take place in other parts of Olkola country. Lithium notes for example that the boundaries of the carbon abatement project as registered under the Commonwealth Emissions Reduction Fund extend beyond the proposed permit areas. However, the evidence suggests the Alwal Recovery Area is a key focus for these activities. Although EPM 26254 and EPM 26257 only cover part of the Alwal Recovery Area, the evidence of Mr Duffey suggests the areas within these permits are also a key part of Olkola's tourism

operations. It is worth noting in this respect that the two permits cover a significant portion of the Aboriginal freehold land within the Alwal Recovery Area. Given the likely timing of Lithium's exploration activities and the extent of the overlap with land management activities undertaken by the Olkola People, I am not satisfied the notification process under the NTPCs will ensure the proposed exploration does not interfere with the planning and execution of Olkola's land management and tourism programs. In my view, the evidence suggests that further consultation is needed to coordinate these activities to avoid such interference.

[46] In reaching this conclusion, I have given particular weight to the fact that the timing and location of activities undertaken as part of these programs is to a large degree contingent on factors such as weather and the need to coordinate them with other land management activities. For example, the planning and execution of activities associated with the carbon abatement project takes account of the proposed location and timing of mustering and the need to undertake 'storm burns' to protect the habitat of the golden-shouldered parrot. Because of this, fire management activities need to be carefully planned and managed. Accordingly, there is particular need for engagement between Lithium and the Olkola People to reduce the risk of interference with land management activities in these areas. I also consider there is likely to be interference with Olkola's tourism operations unless there is close coordination between Lithium and the Olkola People about the conduct of its exploration program, given the nature of those operations and their inconsistency with exploration activity.

[47] In relation to EPM 26253, I note that the evidence suggests the area is less of a focus for the Olkola People's land management activities and it does not appear to be involved in the Olkola People's tourism operations. As Lithium points out, the native title party do not mention the permit area in the context of the carbon abatement project or the cattle mustering operations, and it is not within the boundaries of the Alwal Recovery Area. I also note that the permit area is not subject to Aboriginal freehold. For these reasons, I am not satisfied the grant of EPM 26253 is likely to interfere with the Olkola People's land management programs or other community and social activities.

[48] The State notes that EPM 26257 is currently subject to two exploration permits. A document annexed to the State's contentions indicates that two permits, EPM 15359

and EPM 16301, were granted in May 2007 and October 2008 respectively and together cover approximately half of the area of EPM 26257. Two observations should be made about this information. First, it is not clear whether the figures provided in the 'percentage overlap' column of the document reflect the overlap at the date of grant or the overlap at the time the State provided its submissions. In this respect, I note that the *Mineral Resources Act* provides, subject to the exercise of the Minister's discretion, for the periodic reduction in the area covered by an exploration permit at intervals of three and five years after grant and renewal. Second, there is no evidence as to how the rights conferred under those permits have been exercised in the area over which EPM 26257 is proposed to be granted. In light of these observations, I have given little weight to these permits.

[49] For the reasons I have discussed, I am satisfied there is a real risk that the grant of EPM 26254 and EMP 26257 will interfere with community and social activities carried on by the Olkola People. However, I am not satisfied on the evidence before me that the grant of EPM 26253 is likely to result in interference of that kind.

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

[50] 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 Olkola People identified in relation to the permit areas?

[51] The native title party's submissions on s 237(b) are concerned primarily with areas associated with the golden-shouldered parrot or *Alwal* and the Dingo Story in the southern part of EPM 26253, though the affidavit evidence also identifies other sites said to be of significance to Olkola people.

[52] The native title party states that the *Alwal* is an Olkola totem and emblem of the Olkola Land Management Team. They say the *Alwal* is listed as endangered and the

Olkola Aboriginal Corporation, in partnership with Bush Heritage Australia, have been involved in a research and recovery program to protect the species. Mr Ross states that it is the responsibility of Olkola people to be custodians of the *Alwal* and 'do everything we can to make sure he has a future on our Country'. Mr Ross says this is 'part of our duty to look after our totems'.

[53] Mr Ross states that the story site for the *Alwal* is located to the east of EPM 26254 at place called Piggy Piggy Spring. Mr Lowdown also refers to Piggy Piggy Spring as a story site for the *Alwal* and a place 'where the Old People used to camp'. A map annexed to their affidavits identifies this site as approximately 12 kilometres to the east of the permit, though Mr Ross states that all of the country within EPM 26254 and EPM 26257 is critical habitat for the bird. The native title party also refer to a published recovery plan for the golden-shouldered parrot, which states that the species is restricted to two populations in central Cape York Peninsula. One of these two populations or nesting areas, which the recovery plan refers to as the 'Morehead population', is identified on the map as the 'Olkola Alwal Recovery Area' and includes areas within EPM 26254 and EPM 26257.

[54] Mr Ross states that the 'bottom part' of EPM 26253 is the Dingo People's country. The map annexed to his affidavit shows an area labelled 'Dingo Story' in the south of the proposed permit area. Mr Coleman states that the Dingo Story is located in the southeastern part of the proposed permit area, though he also says 'that whole area near the Lukin River is the Dingo Story area'. Mr Ross says the dingo, or *Alkarra* in Olkola language, is the 'boss' of the Olkola People so it is 'a very important story'. The native title party says the fact that Olkola Aboriginal Corporation's logo and official correspondence incorporates the image of the dingo further attests to the particular significance of the Dingo Story, as it acknowledges the dingo's importance as the boss of Olkola People and Olkola country. The affidavit evidence also suggests there are other sites in or near the area that are not necessarily associated with the Dingo Story. These include Hector Yard and Hector Lagoon, which Mr Ross states are 'in that curve of the Lukin River,' and Spinecop Hill, which Mr Coleman describes as 'an old mining area with old mine shafts'.

[55] The evidence identifies several other sites within or surrounding the proposed permit areas. For example, Mr Ross and Mr Lowdown refer to the *Anyarra* or Worm Story to the east of EPM 26254 (I note that the map annexed to their affidavits identifies a site

labelled ‘Worm Story’ appropriately four kilometres to the east of the proposed permit area). Mr Ross also refers to the Eel Fish story, which he says is located to the north of the Worm Story and ‘runs all through that area’ (the area is depicted on the map to the northeast of EPM 26254). Mr Ross and Mr Lowdown also refer to rock art ‘in the hills’ within EPM 26254 and the map contains a reference to ‘cave paintings’ within the centre of the proposed permit area. Mr Ross also contains a reference to ‘Jack White country,’ which is depicted on the map as an area in the northern part of EPM 26254.

[56] Mr Ross and Mr Lowdown also refer to the existence of gravesites in the area where the proposed permits are situated. Mr Ross says these burial sites are found ‘throughout all that country’ whereas Mr Lowdown says he is aware of ‘at least three’ of these sites around Buffalo Spring and Sugarloaf Spring and another near Billy Mango Swamp’. I note from the map annexed to Mr Lowdown’s affidavit that Sugarloaf Spring is situated in the centre of EPM 26254 whereas Buffalo Spring and Billy Mango Swamp are located to the east of the proposed permit areas. Each of the deponents describe these sites as marked by upside-down matchwood trees, although 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 the Olkola People?

[57] 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]).

[58] I accept that the Dingo Story area is an area of particular significance to the Olkola People. The evidence clearly establishes the importance of the Dingo Story in Olkola tradition. The native title party submits that, under Olkola custom and belief, any disturbance to the site will have ‘grave impacts to the health, well-being and success of the Olkola People’. According to Mr Ross, disturbing the Dingo area ‘will bring the Olkola People down on their hand and knees’ and ‘destroy our relationship with our dreaming and our country’. Mr Coleman compares such disturbance to ‘digging up

Parliament House' and says 'we can't let it happen there'. His evidence also indicates that access to the area is restricted in accordance with traditional law and custom. Specifically, Mr Coleman states that he was taught that he was 'not allowed to go in there' and Olkola people would avoid the area when mustering.

[59] The evidence also establishes that the *Alwal* is a significant totem within Olkola tradition and I accept on this basis that the *Alwal* story place is a site of particular significance to Olkola People. However, I am not satisfied the Alwal Recovery Area as identified on the map is an area of the kind referred to in s 237(b). It is clear from the evidence that the area's significance derives from its status as one of the few remaining populations of golden-shouldered parrot in Far North Queensland, rather than something intrinsic to the area. As I observed in *MNR v FMG Pilbara* at [141], an area or site to which s 237(b) relates must be capable of definition by reference to geospatial criteria. Although the native title party has defined the area, I am not satisfied the evidence supports the particular significance of that area in accordance with their traditions, as opposed to the *Alwal* itself.

[60] I note that Mr Ross describes Hector Yard and Hector Lagoon as an important story place and provides details of the story relating to the site. Mr Coleman also mentions physical markings on a rock at Hector Lagoon that are 'from an important Olkola story'. On this basis, I am satisfied that Hector Yard and Hector Lagoon are sites of particular significance to Olkola People. Although the sites are not marked on the map annexed to the affidavits of Mr Ross and Mr Lowdown, the evidence suggests they are located within the Dingo Story area, in or around the bend in the Lukin River. I also note that Mr Coleman states that the Dingo Story includes 'that whole area near the Lukin River'.

[61] On the other hand, I am not satisfied the other story places identified in relation to the proposed permit areas, such as the Worm Story and the Eel Fish Story, are sites of particular significance within the meaning of s 237(b). While I accept that the affidavit evidence identifies these places as 'important sites,' it does not address the nature or particularity of their significance within the traditions of the Olkola People. Similarly, the evidence does not demonstrate how the rock art in EPM 26254 stands out from other sites of significance to Olkola people in accordance with their traditions.

[62] In relation to the matchwood burial sites, I note Mr Lowdown's statement that these sites are 'very sacred to the Olkola People and we have to be careful about who we

show them to'. I also note Mr Ross' statement that the Olkola People are the only people in Cape York who 'mark their dead' in this way. In other cases, the Tribunal has been prepared to accept that burial sites are sites of particular significance even in the absence of evidence describing the specific connection between the site and the laws and custom of the native title holders (see *Councillor v Bayform Holdings* at [43]; *Wanparta v Young* at [46]). In my view, there is sufficient material to establish that matchwood graves are sites of particular significance to the native title party in accordance with their traditions.

[63] Nonetheless, a finding in these terms is only possible to the extent the sites have been identified. It is a well-established principle that identification of relevant areas or sites is a precondition of the inquiry the Tribunal is required to undertake (see *Yindjibarndi v FMG Pilbara* at [125]). Although Mr Ross states there are matchwood grave sites 'on that Country,' it is not clear to which area he is referring and the description does not provide a sound basis on which to assess the risk of interference. While I accept there are cultural protocols concerning the disclosure of information relating to sites of this nature, the native title party was entitled to seek non-disclosure directions under s 155 of the *Native Title Act*.

[64] On the other hand, Mr Lowdown refers to 'at least three' of these sites around Buffalo Spring and Sugarloaf Spring and another near Billy Mango Swamp. Each of these locations is marked on the map annexed to Mr Lowdown's affidavit. In my view, this evidence provides a sufficient basis for identifying the site and I am satisfied they are sites of particular significance within the meaning of s 237(b), notwithstanding the fact that Buffalo Spring and Billy Mango Swamp are outside the proposed permit areas.

[65] In relation to Spinecop Hill, I note that Mr Coleman does not identify its location or significance. I also note that, although 'Jack White Country' is marked on the map within the area of EPM 26254, there is no evidence as to the area's significance in accordance with the traditions of the native title holders. In light of those observations, I do not consider the evidence establishes that either place is a site or area of particular significance within the meaning of s 237(b).

Are the permit areas 'site rich'?

[66] In addition to the sites identified in the affidavit material, the native title party submit that, based on the evidence of sites in and around the proposed permit areas, the

Tribunal should conclude 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*. The native title party contend that I should conclude on this basis that there is a real risk of interference, inadvertent or otherwise, unless there is consultation about the grant and the activities to be undertaken by Lithium. The State notes the existence of other areas of cultural significance outside the proposed permit areas, but submits there is insufficient evidence to support the contention that the areas are 'site rich'.

[67] 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.

[68] 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 the risk of 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.

[69] In this case, there is no basis on which to infer the existence of areas or sites not otherwise identified in the affidavit material. Although there is an area on the map overlapping EPM 26254 that is labelled 'lots of sacred sites,' the native title party

have not provided any evidence regarding the nature or significance of these sites, other than those specifically identified in the affidavit material. Furthermore, I do not consider there is any basis for drawing a conclusion as to the 'overall spiritual importance' of the area based on the number and distribution of sites identified by the native title party. In this respect, I note the evidence has not addressed the particular significance of many of the sites identified. Therefore, I do not consider the area in which the proposed permits are situated can be characterised as an area of particular significance in accordance with the traditions of the native title party.

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

[70] The native title party notes that, in the course of the objection proceedings, a representative of Lithium 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 the meeting is not relevant to the current inquiry. In Lithium's submission, the Tribunal should take into account the steps it has taken to engage with the native title party as indicative of its attitude towards the protection of Aboriginal heritage.

[71] Lithium submits that, in the course of its engagement with the native title party, it has demonstrated its willingness to commit to voluntary measures to address the risk of interference with Aboriginal cultural heritage. In particular, Mr Kettlewell states that, during a meeting with the native title party on 5 May 2017, Lithium communicated its willingness to allow an Indigenous ranger to accompany its field staff when on site and to avoid areas identified by the native title party to be areas of particular concern if marked on a map prior to entry. According to Mr Kettlewell, Lithium confirmed this position at a status conference before the Tribunal on 18 May 2017. Mr Kettlewell maintains that Lithium will avoid the sites identified on the map annexed to the affidavits of Mr Ross and Mr Lowdown and is willing to engage with the native title party to discuss appropriate cultural awareness training for its field staff for the purpose of identifying and avoiding sites of significance.

[72] The State contends that the evidence shows that Lithium has given due consideration to the importance of cultural heritage and engagement with traditional owners. In particular, it notes that Lithium has attempted to negotiate with the native title party; confirmed its willingness to allow an Indigenous Ranger to accompany field staff

when on site; confirmed it will avoid the sites identified on the map; and confirmed its willingness to engage with the native title party to discuss appropriate cultural awareness training. The State contends that the evidence of Lithium's intentions regarding the location of its exploration activities and its willingness to engage with the native title party demonstrates that it will exercise its rights under the proposed permits in a manner sensitive to cultural heritage matters.

[73] The native title party submits that Lithium's assertion that exploration activities will only be undertaken in a manner that accommodates the cultural concerns of the native title party is merely a bare statement of intention and therefore irrelevant to the Tribunal's task in assessing the proposal against the s 237 criteria. As discussed above in the context of s 237(a), evidence of the grantee party's intentions is relevant to that assessment. 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]).

[74] I accept that Lithium is aware of its obligations under the *Aboriginal Cultural Heritage Act 2003* (Qld) and intends to comply with those obligations. I also accept that Lithium has undertaken to avoid areas of particular concern provided the native title party mark those areas on a map prior to entry, though I acknowledge that such an undertaking would require the participation of the native title party, who may not wish to disclose the location of particular sites. Presumably, Lithium's offer to allow an Indigenous ranger to accompany field staff on site would also require the cooperation of the native title party. It is not clear how the Lithium intends to implement these measures without the cooperation of the native title party. Nevertheless, I have given weight to Lithium's willingness to undertake these voluntary measures as an expression of its intention to avoid interference with areas of cultural significance.

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

[75] The notices issued by the State outlining its intention to grant the proposed permits specify that the permits will be subject to the NTPCs. Lithium and the State submit that the protection offered by the NTPCs will mean the grant of the proposed permits are 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 permits.

[76] 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.

[77] 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 activity must not be carried out in an area if it is likely to directly interfere with community or social activities or sites of particular significance, or 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.

[78] 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]).

[79] 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 mechanisms within the NTPCs that enable the native title party to address non-compliance require significant legal and financial resources, 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 bringing matters in that forum to seek compliance with the NTPCs.

[80] In relation to the first point, 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 who 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.

[81] 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).

[82] 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.

[83] 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.

[84] In relation to the specific example cited by Mr Ross, Mr Leathbridge states that she 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.

[85] 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.

[86] 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 had 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* and requested the Minister revoke the company's existing mining leases and reject applications to renew its existing exploration permits.

[87] 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, 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, Ms Leathbridge provided a response to those issues in June 2017.

[88] 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, Ms Leathbridge's response of June 2017 suggests those issues would be subject to a separate assessment process and that 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.

[89] 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.

[90] 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 Exploration 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.

[91] 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?

[92] 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]. Lithium also notes that, as the Golden-Shouldered Parrot is listed as 'endangered' under the *Environmental Protection and Biodiversity Conservation Act 1986* (Cth), that legislation also provides protection against actions that may have a significant impact on the Alwal.

[93] 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.

[94] 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.

[95] 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 and 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'.

[96] 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.

[97] 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 Area that do not involve physical markings. The native title party acknowledges that the Guidelines provide 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, they submit that the processes described under Part 2 of the Guidelines and the NTPCs do not contemplate sites that lack physical markings.

[98] 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 issue 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.

[99] 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 note that an explorer who fails to comply with the NTPCs risks losing that protection, which in my view adds further weight to the protective effect of the NTPCs as it provides an incentive for compliance.

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

[100] As I have already noted, the native title party's contentions are principally concerned with the risk of interference with areas associated with the *Alwal* and the Dingo Story in the southern part of EPM 26253. Given my finding that areas populated by the golden-shouldered parrot are not areas or sites of the kind contemplated by s 237(b), it is unnecessary for me to consider whether the proposed permits are likely to interfere with those areas. I therefore confine my reasons to assessing the risk of interference with the Dingo Story, including the sites at Hector Yard and Hector Lagoon, and the matchwood gravesites.

[101] It is clear from the evidence that ground-disturbing activities are likely to interfere with the Dingo Story and other sites in that area. Mr Ross states that 'bad things will happen' if mining companies 'go in and mess around' in the area and he is frightened of what would happen if the area were disturbed. Similarly, Mr Coleman says 'the thought of mining companies going in there to dig up Country is wrong'. Mr Coleman

also suggests that unauthorised or inappropriate access to the area would constitute interference in accordance with Olkola law and custom. In particular, he says that his father told him it was 'no good to [go] there' and they 'always kept away from that place' while mustering. The Federal Court has recognised that mere entry onto a site, other than in accordance with the native title party's traditions, may constitute interference under s 237(b) (see *FMG Pilbara v Yindjibarndi Aboriginal Corporation* at [76]).

[102] I also accept that, if Lithium were to physically disturb a matchwood grave, this would constitute interference with the site. In terms of access, Mr Ross states that Olkola people would not want people 'wandering into' areas where matchwood graves are located, regardless of whether they are accompanied by traditional owners. He says Olkola tour guides do not show these sites to tourists because they 'are only for Olkola People'. Mr Lowdown also says they do not show tourists these sites and they 'keep them to ourselves'. On careful consideration of these statements, I am not satisfied unauthorised access would interfere with these sites. While I acknowledge that information about the sites is secret, the evidence as a whole suggests these protocols exist to protect the sites from being disturbed. I note in particular the lack of any reference in the affidavit material to the consequences if strangers were to access these sites as opposed to physically disturbing them.

[103] The State contends that interference with areas or sites of particular significance to the Olkola People is unlikely for several reasons. First, it says there is extensive historical evidence of pastoral activity, exploration and mining in the proposed permit areas. Second, Lithium has expressed an intention to avoid areas of particular significance. Third, Lithium is prepared to provide cultural induction training to field staff and allow an Indigenous ranger to accompany them on site. Finally, the State notes Lithium's statutory obligations under the *Mineral Resources Act,* the *Aboriginal Cultural Heritage Act* and the *Environmental Protection Act 1994* (Qld).

[104] In relation to previous land use, the native title party submits there is no evidence outlining the extent of any previous ground disturbing activity. I note that the documents provided by the State show that several pastoral holdings and other land leases overlap parts of the proposed permit areas, as well a number of historical exploration permits. Although I agree the existence of historical exploration permits does not necessarily imply that rights conferred by those permits have been exercised,

it is reasonable to infer that pastoral activity has occurred in areas subject to pastoral holdings. This includes the area in the southern part of EPM 26253, meaning other land users may have had access to areas around the Lukin River.

[105] In terms of the measures Lithium intends to adopt to avoid interference with significant areas or sites, I accept the company is sincere in its intentions, even though they are not strictly enforceable. I note in particular that the measures proposed by Lithium, including the proposal to avoid areas of particular concern identified by the native title party, were not only made in the context of negotiations but have been reiterated in a sworn affidavit by one of its officers. Although the proposal to allow an Indigenous ranger to accompany field staff would require the native title party's cooperation, I am satisfied Lithium has sufficient information to avoid the Dingo Story and the matchwood gravesites, to the extent they have already been identified.

[106] I have also given significant weight to the NTPCs. Although its exploration program is yet to be finalised, the NTPCs will require Lithium to give the native title party notice of any proposed exploration activities. The native title party will then have the opportunity to meet with Lithium and identify any areas of concern. Lithium will also be required to arrange for a field inspection is required by the native title party, provided the proposed exploration activities are not 'Agreed Exploration Activities' as defined in Schedule 1 of the NTPCs. In the circumstances, I am satisfied that the NTPCs will provide adequate protection against the risk of interference with the identified areas and sites of particular significance, particularly in the context of the specific proposals Lithium intends to adopt in addition to the NTPCs.

[107] For these reasons, I am not satisfied that the grant of the proposed permit areas is likely to interfere with the Dingo Story area or the identified matchwood gravesites.

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

[108] 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]).

[109] 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]).

[110] 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 (see *Yindjibarndi v FMG Pilbara* at [21] and the cases cited therein).

What are the characteristics of the permit areas?

[111] The native title party state that EPM 26254 and EPM 26257 overlap the area granted 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. The documents provided by the State indicate there are pastoral holdings over the northern part of EPM 26254 and a small area along the southern boundary of EPM 26257, whereas the remaining areas are Aboriginal freehold, including areas within the Olkola National Park, or resource reserve declared under the *Nature Conservation Act 1992* (Qld). I note that EPM 26253 is entirely subject to pastoral holdings and other lands leases.

[112] I also note that each of the proposed permit areas has previously been subject to historical exploration permits. As I have noted above, there is no evidence before me as to how the rights conferred by those permits were exercised or the extent of any disturbance to the land or waters associated with previous exploration activity. While it may be inferred that some on-ground exploration has occurred pursuant to these historical permits, I note there have been significant efforts on the part of the Olkola People to rehabilitate and manage the land following the land transfer in 2010.

[113] EPM 26254 and EPM 26257 are also located in the recovery area for the golden-shouldered parrot. According to the native title party, the Golden-Shouldered Parrot is listed as endangered under Schedule 2 of the *Nature Conservation (Wildlife) Regulation 1994* (Qld) and the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). The native title party also notes the particular

importance of the golden-shouldered parrot or *Alwal* as a totem for the traditional owners of the area and say its survival is 'of profound cultural significance' to the Olkola People. Mr Ross states that all of the country within EPM 26264 and EPM 26257 is 'critical habitat for the Alwal'.

[114] The affidavit material also attests to the cultural concerns surrounding the golden-shouldered parrot. Mr Duffey deposes that Olkola people 'view protecting the Alwal as [an] intrinsic part of their custodial duty to Country and [the] cohesiveness of their community'. Mr Ross notes that the *Alwal* is the emblem of the Olkola rangers and lends its name to one of the national parks managed by the Olkola Aboriginal Corporation. According to Mr Ross, 'it is the responsibility of the Olkola People who are out on Country, including myself and the Olkola Rangers, to be custodians of this totem and to do everything we can to make sure he has a future on our Country'. Mr Ross states that, if they do not look after its habitat, 'the Alwal will disappear, and that will affect the Olkola People'. Mr Lowdown also expresses concern that the *Alwal* 'will fly somewhere else or maybe just disappear' if they do not protect its habitat, 'which will be no good for us'.

Is the grant of EPM 26254 and EPM 26257 likely to threaten the Alwal population?

[115] The native title party's submissions suggest there are two ways in which the grant of EPM 26254 and EPM 26257 might threaten the *Alwal* population.

[116] Firstly, Mr Duffey states that 'the very act of granting' EPM 26254 and EPM 26267 will directly impact the ability of the Olkola Aboriginal Corporation to attract funding to undertake the Alwal Recovery Project. He cites in particular a statement attributed to an executive manager of Bush Heritage Australia, to the effect that 'ensuring the project area is secured from incompatible land uses such as mining is a key consideration to our investment'. To the extent this argument suggests the grant of EPM 26254 and EPM 26267 will create uncertainty around funding for the *Alwal* recovery project, this does not constitute major disturbance within the meaning of s 237(c). As the Tribunal observed in *Rosas v Northern Territory* at [84], 'the starting point and pre-condition of any inquiry into major disturbance is evidence of proposed physical disturbance of land and waters'. To the extent that the native title party is arguing that the proposed exploration activity will result in decreased investment

Olkola's land management activities, including the *Alwal* recovery project, I consider the risk to be remote and speculative.

[117] Secondly, the native title party submit that the proposed exploration will disturb the habitat and breeding cycles of the golden-shouldered parrot. In support of this submission, they rely on the letter sent by the Cape York Land Council to the Federal Minister for the Environment and Energy, which quotes a personal communication from Bush Heritage ecologist Terry Mahney. It worth reproducing the quotation in full:

> The golden shouldered parrots are very vulnerable to disturbances during nesting and will easily abandoned [*sic*] nests if disturbed, especially when they are building their nests. Increased activity and disturbance associated with mining exploration will be detrimental to their breeding success. Golden shouldered parrots have a very limited distribution, restricted to a narrow band associated with the upper Moorhead and Alice River Catchments so any disturbance to this habitat by exploration equipment could have significant impacts on overall population viability and survival. Exploration increases the potential damage to breeding and feeding habitat, interfere with carefully managed and planned fire management activities, and potential for adverse fire events. Any tracks created for exploration also has [*sic*] the potential to increase accessibility for predators, particularly feral cats and increase the potential for introduction of weeds such as Grader Grass and Gamba Grass, which in turn have potential to create major damaging changes in fire regimes within GSP habitat.

[118] The statement highlights a variety of risks to the *Alwal* population associated with exploration activity, ranging from disturbance to its habitat through land clearing and other ground-disturbing activities; increased accessibility for predators; and disruption to breeding cycles from increased activity in nesting areas. I note that Mr Lowdown also mentions the potential impact of noise pollution on the *Alwal* population.

[119] Mr Kettlewell states that Lithium intends to carry out the initial stages of its exploration program using existing access tracks or by walking the land where there is no existing road or tracks. I note however that later stages of the program contemplate land clearing for access and drill-pad construction as well as the possible establishment of an exploration camp. He also says that Lithium does not intend to carry out work on the land between March and June to avoid the Alwal breeding season. In reply, Mr Duffey states that Olkola people have 'witnessed the breeding habits of the golden shouldered parrot changing in recent years and there is no sufficient certainty that breeding will be restricted to normal months of Alwal breeding'. It is not clear to what extent these habits have in fact changed or whether

this is part of a consistent trend, noting that Mr Duffey's evidence on this point is anecdotal.

[120] Avoiding exploration during the breeding season is likely to limit the impact of noise pollution. Nevertheless, I satisfied there is still a risk that activities involving land clearing and ground disturbance will have a lasting effect on the habitat of the golden-shouldered parrot, particularly nesting sites, which is likely to have an adverse effect on the success of the Alwal population.

Is the grant of the permits likely to result in major disturbance to the land or waters?

[121] Lithium says its proposed exploration activities will be subject to the *Environmental Protection and Biodiversity Conservation Act*, the *Nature Conservation Act* and the *Vegetation Management Act 1999* (Cth). It makes particular reference to ss 18(3) and 18A of the *Environmental Protection and Biodiversity Conservation Act*. These provisions make it an offence to take an action that has or will have a significant impact on a listed threatened species in the 'endangered' category or is likely to have a significant impact on a species in that category without approval. As the golden-shouldered parrot is listed as 'endangered' under that legislation's list of threatened fauna, Lithium would be required to refer any such action to the Minister for the Environment and Energy for approval.

[122] The State notes that Lithium will also be subject to the NTPCs and the Land Access Code. Relevantly, the Land Access Code imposes mandatory conditions on the holder of an exploration permit granted under the *Mineral Resources Act*. These conditions include: obligations to take all reasonable steps to prevent the spread of declared pests, including by washing down vehicles and machinery before entering a landholder's land in the permit area; a requirement to operate vehicles at speeds that minimise noise, dust and disturbance to the land; and a requirement for the holder to reach agreement with the landholder on the location of any exploration camp and a plan for managing the camp, or to ensure the camp is located in a place that minimises any impact to the landholder's business or land use activities.

[123] I accept that the approval process under the *Environmental Protection and Biodiversity Conservation Act* will minimise any risk of disturbance to the habitat of the golden-shouldered parrot. If Lithium proposes to undertake any action that will or

is likely to have a significant impact on the *Alwal*, then it must refer the action to the Minister for the Environment and Energy for assessment. Lithium is aware of the potential risks to the golden-shouldered parrot, if for no other reason than its participation in the present inquiry, and there is no reason to doubt that it will comply with its obligations. If an action is referred, then the Minister will decide whether it can proceed and may decide to impose conditions on approval.

[124] I have also had regard to the mandatory conditions in the Land Access Code. Although the conditions are primarily concerned with protecting the interests of other land users rather than managing threats to the environment, I consider they will help to minimise any risk of disturbance to the golden-shouldered parrot, especially with respect to the spread of invasive grasses and the establishment of exploration camps.

[125] For these reasons, I am satisfied the grant of EPM 26254 and EPM 26257 are not likely to involve, or create rights whose exercise is likely to involve, major disturbance to the land or waters. In relation to EPM 26253, there is no evidence that the proposed exploration would constitute major disturbance to the land and waters, noting in particular the existing land use of that area.

Determination

[126] The determination of the Tribunal is that:

(a) the grant of exploration permits EPM 26253 to Lithium Australia NL is an act attracting the expedited procedure; and

(b) the grant of exploration permits EPM 26254 and EPM 26257 to Lithium Australia NL are not acts attracting the expedited procedure.

Mr JR McNamara
Member
2 March 2018