NATIONAL NATIVE TITLE TRIBUNAL

***Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd*, [2011] NNTTA 22 (24 February 2011)**

Application No: WO10/171

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

- and -

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

Les Tullock and Others on behalf of the Tarlpa Native Title Claimants (WC07/3) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Bushwin Pty Ltd (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Hon C J Sumner, Deputy President
Place: Perth
Date: 24 February 2011

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – community or social activities of 'looking after country' – discussions, meetings with grantee party, attempting to negotiate agreement – physical activities – activities not take place on area of exploration licence – whether activities arise from claimed or registered native title rights and interests – future act not likely to interfere directly with the carrying on of community or social activities – expedited procedure attracted.

Legislation: *Native Title Act 1993* (Cth), ss 29, 31, 151(2), 237
Mining Act 1978 (WA), s 63, 66
Aboriginal Heritage Act 1972 (WA), s 18

Cases: *Bodney v Bennell* [2008] FCAFC 63; (2008) 167 FCR 84

Champion v Western Australia [2005] NNTTA 1; (2005) 190 FLR 362

Cheinmora and Others v Heron Resources Ltd and Another [2005] NNTTA 99; (2005) 196 FLR 250

Drury v Western Australia [2002] NNTTA 171; (2002) 170 FLR 182

Jango v Northern Territory of Australia [2006] FCA 318; (2006) 152 FCR 150

Leonne Velickovic on behalf of the Widji People/Westex Resources Pty Ltd/Western Australia, NNTT WO03/386, [2004] NNTTA 13 (4 March 2004), Daniel O′Dea

Ned Cheedy and Others on behalf of Yindjibarndi #1/Western Australia/Cazaly Iron Pty Ltd, NNTT WO06/529, [2008] NNTTA 39 (4 April 2008), Hon C J Sumner

Neowarra v State of Western Australia [2003] FCA 1402

Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135; (2005) 145 FCR 442; (2005) 220 ALR 431

Rubibi Community v State of Western Australia (No 5) [2005] FCA 1025

Silver v Northern Territory of Australia [2002] NNTTA 18; (2002) 169 FLR 1

Smith v Western Australia & Anor [2001] FCA 19; (2001) 108 FCR 442

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

Ward v Northern Territory [2002] NNTTA 104; (2002) 169 FLR 303,

Ward v Western Australia [1996] FCA 1452; (1996) 69 FCR 208; (1996) 136 ALR 557

Western Australia v Smith [2000] NNTTA 239; (2000) 163 FLR 32

Western Australia v Ward [2002] HCA 28; (2002) 213 CLR 1; (2002) 191 ALR 1

Solicitor for the native title party:	Mr Malcolm O'Dell, Central Desert Native Title Services
Representative of the native title party:	Ms Irene Assumpter Akumu, Central Desert Native Title Services
Solicitor for the Government party:	Mr Matthew Pudovskis, State Solicitor's Office
Representative of the Government party:	Mr Clyde Lannan, Department of Mines and Petroleum
Representative of the grantee party:	Mr Dennis Hawtin, Bushwin Pty Ltd

REASONS FOR DETERMINATION

[1] On 21 October 2009, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) (the Act/NTA) of its intention to grant exploration licence E53/1406 (the proposed licence) to Bushwin Pty Ltd (the grantee party) and included in the notice a statement that it considered that the grant attracted the expedited procedure (that is, one which can be done without the normal negotiations required by s 31 of the Act).

[2] The proposed licence comprises an area of 214.53 square kilometres located 26 kilometres south-westerly of Wiluna in the Shire of Wiluna. It is overlapped at 100 per cent by the Tarlpa native title claim (WC07/3 – registered from 30 April 2008). No other native title claims overlap the proposed licence.

[3] On 15 February 2010, Les Tullock and Others on behalf of the Tarlpa native title claimants (native title party) made an expedited procedure objection application to the Tribunal in respect of the proposed licence.

[4] In accordance with standard practice the Tribunal gave directions to parties to provide contentions and evidence for an inquiry to determine whether or not the expedited procedure is attracted. These directions allow a four month period from the s 29 closing date for the lodgement of objections (22 February 2010), for parties to discuss the possibility of reaching an agreement which could lead to disposal of the objection by consent.

[5] At the adjourned preliminary conference on 30 March 2010, the grantee party representative reported that the grantee party wished the matter to proceed to an inquiry and the matter was adjourned to the listing hearing on 8 July 2010. This was subsequently adjourned until 24 September 2010, following several requests to extend time for compliance in preparation for inquiry.

[6] There were numerous contentions and evidence provided for this matter, with both the Government party and the native title party seeking extensions of time and the right to reply. Following a listing hearing which I convened on 24 September 2010, I extended direction dates for final submissions to be put forward. The Government party provided its final response on 5 October 2010 and the native title party on 18 October 2010.

[7] Parties agreed that the inquiry be heard 'on the papers' that is without holding a further hearing. I am satisfied that the objections can be adequately determined on the papers (s 151(2)).

Legal principles

[8] Section 237 of the Act provides:

> **'237 Act attracting the expedited procedure**
>
> A future act is an ***act attracting the expedited procedure*** if:
>
> (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and
>
> (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and
>
> (c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.'

[9] In *Walley v Western Australia* [2002] NNTTA 24; (2002) 169 FLR 437 (*Walley*), I considered the applicable legal principles (at 439-449 [7]–[23]) and I adopt those findings for the purposes of this inquiry.

The nature of an exploration licence including conditions to be imposed

[10] In *Walley* (at 449-445 [24]-[37]) I also considered the nature of exploration licences and the conditions to be imposed, including what activities are permitted by it and what limits are placed on those activities (at 449-454 [24]–[35]). I also adopt those findings for the purpose of this inquiry, while noting that the *Mining Act 1978* (WA) has since been amended and the standard conditions to be imposed on the exploration licence as described in *Walley* (at 453-454 [34]) have been strengthened.

[11] The standard conditions to be imposed are now as follows:

> '1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
>
> 2. All consteans and other disturbances to the surface of the land made as a result of exploration, including drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Industry and Resources (DoIR). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DoIR.

> 3. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.
>
> 4. Unless the written approval of the Environmental Officer, DoIR is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.'

[12] Standard condition 2 now requires that backfilling and rehabilitation of the land must be carried out no later than six months after excavation unless otherwise approved by the Environmental Officer, Department of Mines and Petroleum (DMP). Standard condition 4 is also to be read with s 63(aa) of the *Mining Act 1978* which requires approval by the Environmental Officer, DMP, of a program of work lodged by a grantee party in the prescribed manner before ground disturbing equipment can be used. Before assessment, the program of work for exploration, amongst other things, requires a grantee party to provide information from the Register of Aboriginal sites; advise whether the proposal intersects the boundary of registered sites; and consult with the Department of Indigenous Affairs and obtain advice from that department that the proposed activities are acceptable.

[13] Section 66 of the *Mining Act* sets out what a holder of an exploration licence is authorised to do.

> 'An exploration licence, while it remains in force, authorises the holder thereof, subject to this Act, and in accordance with any conditions to which the licence may be subject —
>
> (a) to enter and re-enter the land the subject of the licence with such agents, employees, vehicles, machinery and equipment as may be necessary or expedient for the purpose of exploring for minerals in, on or under the land;
>
> (b) to explore, subject to any conditions imposed under section 24, 24A or 25, for minerals, and to carry on such operations and carry out such works as are necessary for that purpose on such land including digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for the purpose in, on or under the land;
>
> (c) to excavate, extract or remove, subject to any conditions imposed under section 24, 24A or 25, from such land, earth, soil, rock, stone, fluid or mineral bearing substances in such amount, in total during the period for which the licence remains in force, as does not exceed the prescribed limit, or in such greater amount as the Minister may, in any case, approve in writing;
>
> (d) to take and divert, subject to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act water from any natural spring, lake, pool or stream situate in or flowing through such land or from any excavation previously made and used for mining purposes and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so

> taken for his domestic purposes and for any purpose in connection with exploring for minerals on the land.'

[14] The prescribed limit for the purposes of s 66(c) is 1,000 tonnes: Regulation 20 of the *Mining Regulations 1981* (WA).

[15] There is no dispute that the future act encompasses both the grant of the exploration licence and the activities which may be carried out pursuant to it.

[16] It is also accepted that the intentions of the grantee party in a particular matter are relevant in assessing whether the activities are likely directly to interfere with the carrying on of the native title party's community or social activities or interfere with areas or sites of particular significance to a native title party. As Member Sosso (now Deputy President) said in *Silver v Northern Territory* [2002] NNTTA 18; (2002) 169 FLR 1 (*Silver*) (at [30]) following the Federal Court's decision (French J) in *Smith v Western Australia & Anor* [2001] FCA 19; (2001) 108 FCR 442 (*Smith/FC*).

> 'The adoption of the predictive assessment test necessarily allows the Tribunal to receive evidence of a grantee party's intention where the evidence is adduced. In the absence of any evidence of intention, the Tribunal would be at liberty to assume that a grantee party will fully exercise the rights conferred by the tenement. ... . [E]vidence of intentions ... is logically relevant to the question of likelihood.'

The intentions of the grantee party

[17] A statement from Mr Dennis Hawtin, the sole director of the grantee party is included in the grantee party's contentions. In it, Mr Hawtin indicates that:

- the initial exploration program would involve desk-top research;
- the next step would involve field mapping and soil and rock chip sampling but no ground disturbance, with the majority of the field work being undertaken along old fence lines and tracks or 'old surveyed mineral claims'; and
- after the results of the field work have been assessed, 'work would probably require RAB drilling of coherent gold and multi-element soil anomalies', again conducted mostly on existing access routes: grantee party's contentions, [36].

[18] Mr Hawtin also states that:

> '... bearing in mind that there has been at least 18 other tenements over this ground one could make a reasonable presumption that there will be several other unmarked tracks that will provide access without any ground disturbance: grantee party's contentions, [36] ...
>
> ... because I am required to, and more than prepared to, sign a Regional Standard Heritage Agreement ("**RSHA"**) , I will obviously be entering into discussions with the Native Title Party prior to any major exploration program undertaken on this exploration licence. In the event that the Native Title Party does not sign the RSHA, I will still attempt to have discussions with the Native Title Party prior to any major exploration program undertaken on this exploration licence.' grantee party's contentions, [37].

[19] Mr Hawtin's evidence is contained in a statement lodged by him rather than attested to in a duly sworn or affirmed affidavit. This could go to the weight given to those statements by the Tribunal in conducting the requisite predictive assessment but there is nothing in the circumstances of this case including any contest from the native title party to suggest that Mr Hawtin's statement should not be accepted.

[20] My determination is based on there being a future act which comprises the grant of the proposed exploration licence and the exploration activities deposed to by Mr Hawtin. While the activities authorised by the grant will not be exercised to their fullest extent, I have had regard to the fact that the exploration may eventually result in ground disturbing activities involving drilling and the disturbance of land incidental to it.

Evidence in relation to the proposed act

[21] Government party documentation establishes the underlying land tenure of the proposed licence to be as follows:

- Lake Way Pastoral Lease 3114/1164 (99.5 per cent overlap); and
- Four Road Reserves (less than 0.1 per cent overlap each).

[22] There are no Aboriginal communities identified inside the area of the proposed licence however there are three Aboriginal communities situated approximately thirty five kilometre north-west of the proposed licence area. Aboriginal people also reside in the town of Wiluna.

[23] Department of Indigenous Affairs (DIA) documentation provided by the Government party reveals no registered Aboriginal sites under the *Aboriginal Heritage Act 1972* (WA) (AHA) within the proposed licence areas, but a number of sites are located approximately

five kilometres in a westerly direction of the area, including mythological sites, rock shelters, artefact/scatters and quarries.

[24] Government party documents indicate that three areas of the proposed licence were released for geothermal acreage in 2008 and 2009 resulting in the proposed licence area being wholly overlapped by them (G08-67 at 0.1 per cent, G08-74 at 28.6 per cent and G09-260 at 71.3 per cent). There are three live miscellaneous licences and one prospecting licence active over the proposed licence area, encroaching between 0.1 and 0.4 per cent. I also note numerous mineral claims were active variously between 1966 and 2008, as well as three temporary reserves between the years 1959 and 1972.

[25] In addition to the standard conditions referred to above, there will be conditions requiring the pastoral lessee to be notified of the grant of the licences and of certain exploration activities (conditions 5-6).

[26] The grant of the proposed licence will also be subject to a condition requesting the written consent of the Minister responsible for the *Mining Act 1978* being obtained before commencing exploration activities on Repeater Station Site Reserve 42638 and Water Reserve 12828 (condition 7). The proposed licence is also subject to a further condition relating to restrictions on access to miscellaneous licences 52/115, 52/146 and 52/148 being preserved to the draft licensees (condition 8).

[27] A condition (the RSHA condition) will also be imposed in the following terms:

> 'In respect of the area covered by the licence the Licensee, if so requested in writing by the Tarlpa People, the applicants in Federal Court WAD 248 of 2007 (WC07/3), such request being sent by pre-paid post to reach the Licensee's address, Mr D Hawtin, PO Box 1760, West Perth WA 6872 not more than ninety days after the grant of this licence shall within thirty days of the request execute in favour of the Tarlpa People the Regional Standard Heritage Agreement endorsed by peak industry groups and Ngaanyatjarra Land Council (now known as Central Desert Native Title Service).'

[28] The following Endorsements (which differ from conditions in not making the licensee liable to forfeiture of the proposed licence if breached) will be imposed.

- The Licensee's attention is drawn to the provisions of the *Aboriginal Heritage Act 1972* (WA) and any Regulations thereunder; and

- The Licensee's attention is drawn to the *Environmental Protection Act 1986* (WA) and the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*, which provides for the protection of all native vegetation from damage unless prior permission is obtained.

Evidence provided by the native title party

[29] The contentions of the native title party include the sworn affidavits of Victor Ashwin (VA Aff) and Lindsey George Langford (LGL Aff) made in the following terms:

> **Affidavit of Victor Ashwin** (VA Aff)
> 'I, Victor Ashwin, of Windidda Community make oath and say as follows:
>
> **BACKGROUND**
>
> 1. I make this affidavit in support of the Statement of Contentions of the Objectors in an inquiry to the objection to the expedited procedure matter WO10/171.
> 2. The information in this affidavit is something that I know to be true.
> 3. I am a traditional owner in the Tarlpa native title claim area (WAD 248 of 2007).
> 4. I have been shown a map of the area of tenement application E53/1406.
>
> **THE DECISION MAKING PROCESS OF THE COMMUNITY THAT COMPRISES THE TARLPA CLAIM GROUP**
>
> 5. I know the country of the application area, it is part of the country that we look after.
> 6. When I talk about we, I mean the Tarlpa native title claimants who, as a part of their traditional law and custom are responsible for the land in the Tarlpa Native Title Claim.
> 7. We are all one people and we all look after our land in the Tarlpa claim area.
> 8. We are responsible for looking after country. When we talk to each other we are always talking about looking after country.
> 9. Looking after country is making sure that our country is looked after the proper way.
> 10. When we make important decisions that effect the country, we all have to talk about it and make the decision together. It must be agreed by all people who speak for country in each particular part of the Tarlpa claim area and these decisions must be known by everyone in the Tarlpa claim area.
> 11. Making decisions about looking after country is a very important job and this is something that everyone is involved in, many Tarlpa claimants spend a lot of time doing this because of their cultural obligation to make sure Tarlpa country is looked after the proper way.
> 12. The main way that the Tarlpa claimants undertake community activity that looks after country the proper way is by looking after the land.
>
> **THE WAY IN WHICH THE TARLPA COMMUNITY DO COMMUNITY ACTIVITIES WHICH HELP THEM LOOK AFTER SITES AND SPECIAL PLACES AND LOOK AFTER THE LAND**
>
> 13. We must look after the land together the proper way.
> 14. This is a big job and it is very important because it shows respect for the land.
> 15. We have to make sure that we all look after the land and we have to make sure that any visitors are also looking after the land properly. We look after the land so that it is still good for our children and grandchildren.

16. Many people in the past who came into the Tarlpa claim area did not look after the land. We do not want this to happen in the future.

17. To stop this happening, we make sure that all people who come into the Tarlpa claim area look after the land and show respect for the land. We do this by talking about it together so everyone knows what is happening on the land and then deciding together whether it is showing proper respect to the land and whether people should or should not be doing those things on the land.

18. When a mining company wants to come into the Tarlpa claim area, we enter into an agreement with them that makes them look after the land the way we do.

19. These agreements allow for us to check up on the mining company to make sure they are caring for country, especially when getting ready to leave. We will go out and see if the mining company has cleared up after itself and done all the things to look after the land that it said it would do.

20. If we are not allowed to talk to Bushwin Pty Ltd and reach agreement with them, then we can not look after the land properly, which we have to do together.'

[30] The evidence of Mr Ashwin is uncontested and I accept it. Mr Ashwin says he is a traditional owner of the Tarlpa native title claim area. Although Mr Ashwin is not one of the persons comprising the applicant and registered Tarlpa native title claimant, I accept he is a member of the claim group and also has the necessary authority to speak for country on behalf of the native title party.

Affidavit of Lindsey George Langford (LGL Aff)

'On the 12th day of August 2010, I Lindsay George Langford, of 170 Wellington Street, East Perth in Western Australia, make oath and say as follows:

1. I hold a Bachelor of Arts (Anthropology) and have been employed at Central Desert Native Title Services (CDNTS) since 3 July 2008.

2. Except where otherwise stated, the facts herein deposed are within my own knowledge or have come to my knowledge through access to information, which I believe to be true and which is identified in this affidavit.

3. I swear this affidavit in support of the Objector's contentions in this matter.

4. My current role is West Side – Facilitator Land And Community at CDNTS. My previous role at CDNTS was as Anthropologist/Project officer for the Tarlpa native title claim (WAD 248 of 2007) and Wiluna native title claim (WAD 6164 of 1998).

5. Since coming to CDNTS, I have spent the majority of my time working on land based projects. These projects have been coordinated in collaboration with, and informed by, the instructions of the respective Wiluna/Tarlpa native title claim groups. As part of my work, I attend claim meetings, law and culture meetings and undertake trips 'on country' in the claim area.

6. I spend and have spent considerable time with members of the community and have spoken at length to them about their native title rights in a formal and informal setting. Through these discussions, I have come to understand that 'looking after country' is:

   a. a vitally important community activity that is continually practiced against a framework of traditional law and custom; and

   b. the main cultural imperative behind the majority of claimant's involvement in the native title process.

7. In recognition of the importance of this community activity and the need for people to have support in exercising native title rights, the Land and Community section of CDNTS was created.

8. The activity undertaken by the Wiluna/Tarlpa community of native title holders under their traditional laws and customs is frequently referred to in short by them as fulfilling their duty to 'look after country'.

9. This activity may manifest in:

    a. ensuring visitors look after the country the proper way;

    b. visiting waterholes in order to maintain them;

    c. intergenerational transfer of knowledge about flora, fauna and maintenance of country;

    d. transfer of knowledge about traditional law and culture;

    e. traditional burning regimes; and

    f. cultural site maintenance

10. Of relevance in this matter is the activity associated with 'ensuring visitors look after country the proper way'. All persons entering onto country, including miners, are considered visitors and because this activity is considered a 'duty' it is taken very seriously by the community.

11. The activity associated with the duty to 'look after country' is not one that falls on a single person or a single group of people, it is an activity that the native title claim group do together. In order to ensure visitors look after the country the proper way, and hence the community is conducting its duty, the community will talk to visitors and continually discuss the visitors objectives and methods for the land amongst themselves. I know this from observing the practices of the Claimants in my experience in the area and also from discussions with Claimants.

12. This activity is conducted by the community of native title holders predicated on priorities. These priorities have been identified by the native title claimants to myself during a series of consultation on country that were set up to assist the Land and Community Projects. The priorities are:

    a. keeping country healthy;

    b. keeping Martu healthy;

    c. bonding and learning between young people and old people;

    d. employment and an economy; and

    e. ensuring a seat at the table in decision making.

13. CDNTS facilitates a Return to Country project that has become a platform on which community discussion about looking after country takes place. These trips are wholly focused on mobilizing as many community members as possible to get back onto specific areas of country that form part of the cultural landscape of the claimant community. This allows community members to check the country and generates further discussion of whether the activity of looking after country is being done adequately and what more the community can do to fulfil their duty.'

[31] In his affidavit, Mr Langford states that he holds a Bachelor of Arts (Anthropology) and that he has been employed at Central Desert Native Title Services (CDNTS) since 3 July 2008. His evidence is that he is currently the West Side – Facilitator Land and Community and was previously the Anthropologist/Project Officer for (among others) the Tarlpa native

title claim. His goes on to address a number of matters relevant to these proceedings, as set out above.

[32] The Government party contends that, because 'Mr Langford is an employee of ... CDNTS ... and not a member of the NTP', his affidavit should be given 'limited, if any, weight': Government party's reply of 20 August 2010 to native title party's contentions at [4]. The native title party contends this amounts to an invitation to draw the inference that, because Mr Langford is employed by CDNTS, his evidence 'cannot be trusted'. The native title party further contends that:

> '[T]he Tribunal should weigh Mr. Langford's affidavit appropriately as it ... corroborates the evidence of Mr. Ashwin provided in his affidavit dated 11 August 2010; and ... is provided by a person who is employed by Central Desert *inter alia* specifically to assist the Tarlpa community with facilitating the community activity the subject of this inquiry': Objector's reply dated 27 August 2010, [14].

[33] The only reason provided by the Government party as to why 'limited, if any, weight' should be given to Mr Langford's affidavit evidence is that he is 'an employee of ... CDNTS ... and not a member of the NTP'. In my view, this does not support the Government party's contention that I should give no weight to the evidence of Mr Langford.

[34] I accept the native title party's contention that Mr Langford's evidence should be given 'appropriate' weight. The fact that Mr Langford is an employee of CDNTS and that he is familiar with the Tarlpa claim group is no impediment to accepting his evidence unless there is other evidence which throws doubt on its reliability. No doubt, as a result of his employment, he has become close to at least some members of the Tarlpa claim group but, on its own, this is not a sufficient basis to disregard or discredit his evidence. Further, the Government party agreed that this matter could be determined on the papers. If it sought to impugn Mr Langford's credibility or candour, then it should have sought leave to cross-examine him.

[35] The Federal Court has found that expert anthropological evidence of traditional laws and customs and connection to country based on field work, which accords with the member of the native title claim group's evidence, is probative: *Neowarra v State of Western Australia* [2003] FCA 1402 at [388]; *Rubibi Community v State of Western Australia (No 5)* [2005] FCA 1025 at [263]; *Jango v Northern Territory of Australia* [2006] FCA 318; (2006) 152 FCR 150; at [291] to [292].

[36] As the Full Court of the Federal Court has noted, an anthropologist such as Mr Langford may observe and record matters relevant to both the social organisation of a native title claim group and the nature and content of their traditional laws and traditional customs. There may also be circumstances in which an anthropologist may give evidence about the meaning and significance of what Aboriginal witnesses say and do so as to explain or render coherent matters which, on their face, may be incomplete or unclear: *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135; (2005) 145 FCR 442; (2005) 220 ALR 431 at [89].

[37] Unlike the Court, the Tribunal is not bound by the rules of evidence, which gives it greater scope to accept the evidence of Mr Langford. However, the Federal Court's observations about the role anthropological evidence plays in native title cases are of assistance in this matter and support the Tribunal's acceptance of it. Mr Langford's evidence is sworn, has not been challenged and I have accepted it for the purposes of my determination.

Native title party's contentions in relation to s. 237(a)

[38] Only the contentions made in relation to s 237(a) are summarised and dealt with below. This is because the native title party has 'amended' its objection application (Form 4) so that it no longer makes any reference to ss 237(b) and (c) and has not provided any evidence in relation to those provisions: see native title party reply 27 August 2010, [8].

[39] In the Form 4 as lodged, the native title party stated that allowing the grantee party access and use of the area for exploration purposes:

> '[W]ill directly interfere with their capacity to travel, hunt, camp, and access food, water and other resources by dislocating them from these resources. Dislocation from this area ... will adversely impact on their capacity to maintain these traditional activities and lifestyle.'

[40] However, in the event, the native title party did not pursue this contention. Instead, it was argued that the grant of the tenement is likely to interfere with the community activities of the persons who are the native title holders for the area concerned that are associated with the obligation to 'look after country', based on the evidence of Messrs Ashwin and Langford, and the parties agree that this is the sole issue to be considered. Therefore, only the contentions relating to that issue are noted here.

[41] The key aspects of the native title party contentions are as follows.

- There is a community of native title holders situated on and in the vicinity of the proposed tenement identified in the Tarlpa claimant application (WAD248/2007) and that is the community that 'collectively observes the traditional laws and customs that give rise to the set of native title rights and interests as described on the Register [of Native Title Claims]': native title party contentions 12 August 2010, [53];

- Those registered rights 'give rise to numerous physical activities undertaken by the community': native title party contentions 12 August 2010, [54];

- 'The uncontested evidence before the Tribunal is that in ***all*** cases where visitors including mining companies seek to enter onto Tarlpa country the community undertakes the activity of ... ensuring visitors look after the country the proper way' and 'undertakes this activity by first meeting with the visitors and then discussing how the visitors should go out on country in order for them to look after country the proper way': native title party contentions 12 August 2010, [55], emphasis in original;

- 'There is no provision for this activity to take place' if the expedited procedure is attracted to the grant of the tenement. Therefore, it is 'axiomatic' that 'this essential community activity, undertaken as a duty by the Tarlpa claimants to look after country will be affected' by the grant of the tenement and 'also axiomatic' that s 237(a) 'is enlivened' such that the expedited procedure is not attracted: native title party contentions 12 August 2010, [56]-[57];

- There is no requirement in s 237(a) that 'the community activity take place in the area of the tenement'. What s 237(a) requires is that 'the grant of the proposed tenement, be likely to interfere with that community activity': native title party reply 27 August 2010, [16];

- It would be 'extraordinary to suggest that the community activity [in this case] ... would necessarily take place on the area of the tenement as *inter alia* issues relating to accessing the land are the very subject of the community activity referred to': native title party reply 27 August 2010, [16];

- In any event, 'it appears to be common ground' that Mr Ashwin's affidavit 'identifies and explains' the activities associated with 'looking after country': native title party reply 27 August 2010, [17];

- Compatibility with the expedited procedure is not the test the Tribunal is required to apply and, in any event, the community activity is not compatible with the expedited procedure applying. The correct test is that set out in the Government party contentions, 12 July 2010, [59], i.e. 'on the basis of a predictive assessment, whether there is a "*real chance or risk*" that the act will "*interfere directly*" with the "*carrying on of the community or social activities*" of the native title holders': native title party reply 27 August 2010, [19], emphasis in original;

- The community activity relied upon in this case 'is undertaken as a cultural duty under traditional law and custom ... . This cultural duty is also manifest in the corresponding native title rights and interests of the Tarlpa community to look after country [see registered native (*sic*, insert 'title') rights and interests ...] which rights and interests themselves derive from traditional law and custom': native title party reply 27 August 2010, [20];

- The 'clear and unambiguous intent' of the Act is that "where matters involve, as in this case, the interference with community activity undertaken as a duty under law and custom and as a native title right, then the 'right to negotiate' is the appropriate umbrella for mitigating the interference with that activity": native title party reply 27 August 2010, [22];

- This is 'not compatible with the expedited procedure applying' as that procedure does not provide for 'every reasonable effort to be made in securing the agreement of the native title holders', a reference to the Preamble to the Act: native title party reply 27 August 2010, [22];

- The Regional Standard Heritage Agreement (RSHA) '***does not*** attempt to deal with all of the elements of the community activities associated with "looking after country"' as described in the NTP's evidence, e.g. it does not allow the Tarlpa community to 'look after land in accordance with their priorities' and 'discuss the tenement prior to grant and consider whether its grant is appropriate and consistent'

with looking after the land the proper way': native title party reply 27 August 2010, [27], emphasis in original; and

- The 'content of; ... [the] unfunded and un-notified process associated with; and ... [the] take it or leave it approach of the unilaterally initiated Government Party process of the RSHA, does not in any way mitigate the interference with the community activities identified and described in the affidavit of Mr Ashwin': native title party reply 27 August 2010, [28].

[42] In the native title party's reply 27 August 2010, [29], the native title party concludes that, on the question of whether or not there is a likelihood of interference of the kind contemplated by s 237(a):

- There are community activities undertaken by the Tarlpa community which are "ongoing; ... apply to all 'visitors' to country including the Grantee Party; and ... are undertaken as a cultural duty;

- There is a real chance or risk that the grant of the proposed tenement will directly interfere with those community activities because, if the expedited procedure is attracted 'there is no mechanism available to the Tarlpa community to ensure that the community activities can take place';

- The 'impact on the community or on individuals within that community in failing to fulfil that duty by undertaking these activities will be substantial' because the community activity in question is undertaken as a duty under traditional law and custom';

- The community activity in question 'is a clear manifestation of the claimed native title rights and interests of the Tarlpa community';

- the 'purported willingness' of the grantee party to enter an RSHA is not relevant to the Tribunal's inquiry because the RSHA has not been provided for the native title party's consideration and, 'in any event, does not cover the matters that are the subject of the community activities'; and

- 'section 237(a) is enlivened' and 'the proposed grant ... is not an act to which the expedited procedure applies': native title party reply 27 August 2010, [29].

[43] In the native title party's further reply of 18 October 2010, addressing the grantee party's reply of 5 October 2010 (which is summarised below), the native title party contends that:

- the native title party evidence does not, and is not intended to, identify any 'physical' community activities carried out within the area of the proposed tenement, [5];
- this is because s 237(a), 'neither mentions nor requires that those community ... activities are limited to those physical activities undertaken within area of the proposed tenement'. Rather, s 237(a) "only requires that there be a likelihood that those community ... activities are 'directly' interfered with", [5];
- this approach 'accords with' the Explanatory Memorandum (EM) to the Native Title Amendment Bill 1997 at [20.39], [6];
- the evidence of Mr Ashwin and Mr Langford 'clearly identifies *physical* aspects of community life [footnoted with 'Which are a manifestation of the native title rights of the Tarlpa community], which the Objector further contends will be *directly* interfered with by the grant of the proposed tenement', [7], emphasis in original;
- it is 'irrelevant' for the purposes of the Tribunal's inquiry that 'the community or social activities in question may occur outside of the proposed tenement, [8];
- 'The relevant factors to be ascertained relate solely to the likelihood of direct interference with the physical aspects of community life related in turn to the physical ability to enjoy the relevant native title rights of the Tarlpa community. ... [T]his is the situation in the circumstances of this inquiry', [8];
- while it is agreed that all references to the state's regulatory regime are 'irrelevant for the purpose of this particular inquiry', it is not agreed (as the Government party contends) that in a case such as this, 'greater attention needs to be given to the nature of the alleged "activities", and the nature of the alleged "interference" with those activities', [9]-[10], quoting the Government party reply 5 October 2010, [4];
- it is not clear what the Government party means by this and, in any case, the Tribunal's task remains the same, i.e. it must 'ascertain ... whether there are community or social activities undertaken by the persons who are the holders of

native title in relation to the land and waters subject to the proposed grant' and, if so, 'whether those community or social activities are likely to be directly interfered with'. If the answer to those questions is 'yes', then the act does not attract the expedited procedure. 'No greater or lesser attention should be paid to the nature of those activities or to the nature of the interference than is paid in any other inquiry', [11];

- the Government party's contention that: 'The physical dimension [of the identified community or social activities must be] ... interfered with **physically**' is incorrect. The correct test is whether 'the physical dimension of the community activity is interfered with **directly**', [21], emphasis in original;

- it is 'axiomatic' that the grant of the tenement 'absent any mechanisms that requires or even allows for the community or social activities described in the affidavits of Mr Ashwin and Mr Langford to be undertaken, will be the proximate cause of the apprehended interference with those activities', [23];

- 'Consequently, the **physical** dimensions of the community or social activities will be interfered with **directly** by the grant of the proposed tenement. In addition, as the activity in question is undertaken as a cultural obligation or duty, ... that interference with be substantial', [23], emphasis in original.

[44] The basis of the native title party's argument is:

> 'Therefore, the Government Party's assertion in paragraph 5 is manifestly incorrect. The basis of the Objector's argument is that; the only mechanism that exists under the NTA that allows the Tarlpa community to undertake the [physical] activities associated with 'looking after country' is, as parliament intended, under the 'right to negotiate' provisions of the NTA. This is because, absent the right to negotiate, the community activities associated with 'looking after country' generally and in particular the activities associated with:
>
> a. discussing within the community, the proposed activities of the Grantee Party;
> b. meeting, negotiating and [if possible] reaching agreement with the Grantee Party on how it conducts its exploration activity; and
> c. ensuring that the Grantee Party has complied with any obligations it has agreed to, while conducting its exploration activities and at the cessation of those activities,
>
> simply cannot take place. As such, the grant of the proposed tenement under the 'expedited procedure' directly interferes with a broad suit of activities that are associated with 'looking after country' and s. 237(a) of the NTA is enlivened', native title party further reply, 18 October 2010, [15]. [Insertion in square brackets in original quote]

[45] However, they also say that:

> 'The native title party fully understands that ultimately its capacity to fulfill its cultural duty to look after country through the activities described by Mr Ashwin and Mr Longford are governed by the NTA, even if under traditional law and custom such activity may not be so governed', native title party further reply 18 October 2010, [35].

Government party's contentions in relation to s 237(a)

[46] The Government party contends (among other things) that:

- The fact that there are no Aboriginal communities in the 'relevant area is a relevant and important consideration for the Tribunal': Government party contentions (GVP), 12 July 2010, [65];

- The grantee party's willingness to enter into a RSHA and the imposition of the RSHA condition is a relevant factor in determining that there is not likely to be interference of the kind contemplated by s 237(a): GVP contentions, 12 July 2010, [66], GVP reply, 20 August 2010, [8];

- If such an agreement were to be made, the grantee party would be required to notify the native title party and provide the native title party with detailed information about any proposed on-ground works before commencing those works, consult with the native title party about surveys of the land in relation to ground disturbing works before carrying out those works, carry out surveys with the participation of the native title party before commencing any ground-disturbing work in some circumstances and consult with the native title party before applying for consent under s 18 of the AHA Act: GVP reply, 20 August 2010, [9];

- Any such agreement 'is capable of allowing the NTP to fulfil its duties with respect to "looking after country" as explained by Mr Ashwin in his affidavit': GVP reply, 20 August 2010, [10];

- The grantee party's willingness to enter into an agreement shows the grantee party is willing to consult with the native title party and avoid activities likely to interfere with the community activities of the persons who are the native title holders for the area concerned: GVP Contentions, 12 July 2010, [69(b)];

- The grantee party's statement (GVP6) indicates that the proposed exploration activities are 'likely to be for a limited period and [any interference] could be avoided through proper consultation between' the grantee party and the native title party: GVP Contentions, 12 July 2010, [88(a)];

- The State's regulatory regime with respect to mining, protection of Aboriginal Heritage and environmental protection 'is capable of mitigating and avoiding any direct interference with the carrying on of community and social activities of native title holders, to the extent those activities are manifested in physical activities within the area of the tenement': GVP reply 5 October 2010, [4];

- However, where (as in this case) 'there are no physical activities within the tenement ... , it is conceded that the State's regulatory regime may be of little or no relevance': GVP reply, 5 October 2010, [4];

- In such a case, 'greater attention needs to be given to the nature of the alleged "activities", and the nature of the alleged "interference" with those activities: GVP reply, 5 October 2010, [4];

- The native title party is arguing that:

  - unless the grantee party 'enters into the NTP's preferred agreement, the NTP cannot "look after country"';
  - 'the only alternative is the right to negotiate': GVP reply, 5 October 2010, [5];

- Even if some of the things the native title party asserts are activities within the meaning of s 237(a), 'the balance of the authorities support the proposition that for section 237(a) not to be engaged, the native title party must identify a physical dimension of the community or social activity relied on' and the physical dimension so identified 'must be physically interfered with'. This interpretation 'best accords' with the EM for the 1997 Bill, as discussed by DP Franklyn in *Western Australia v Smith* [2000] NNTTA 239; (2000) 163 FLR 442 at [21]: GVP reply 5 October 2010, [9];

- By not 'asserting any physical activity within the area of the tenement, the NTP has not identified a physical dimension of the alleged activities' and so 'there will be no physical interference with those activities and section 237(a) is engaged such that the expedited procedure applies': GVP reply 5 October 2010, [10];

- If the Tribunal takes the view in this matter that community and social activities need not have a physical dimension, then the RSHA 'is capable of answering the NTP's concerns': GVP reply, 5 October 2010, [11];

- The native title party is 'essentially inviting the Tribunal to find that the expedited procedure does not apply because the act will not be done on the terms of the NTP (which may amount to an assertion of a right of veto)': GVP reply, 5 October 2010, [15];

- However, 'the application of the expedited procedure ... is not concerned with obtaining the agreement of the native title party to the act'. That is the province of the "*right to negotiate*", which only applies ... if it is first demonstrated that the expedited procedure should not apply': GVP reply, 5 October 2010, [15], footnotes omitted, emphasis in original; and

- 'The importance of the "right to negotiate" to native title parties, and the potential for that process to yield agreements between parties, is no basis for finding that the expedited procedure does not apply': GVP reply, 5 October 2010, [15], footnotes omitted.

Relevance of the Regional Standard Heritage Agreement (RSHA).

[47] The native title party and the Government party both made substantial contentions on the relevance of the RSHA. The Government party's contentions are summarised above. The native title party contends in its further reply of 18 October 2010 that:

- There is no mechanism through which the native title party would become aware of any conditions imposed or proposed by the Government party on the tenement (including the RSHA) unless matters in the expedited procedure proceed to inquiry and, even if a matter does do so, the native title party 'relies on' the Government party to provide information about any such conditions, [25];

- This is true also of the proposed activities of the grantee party, i.e. there is 'no mechanism through which the Tarlpa community are able to ascertain the nature and extent of the proposed activity of the grantee party and its consequent likely effect on the Tarlpa community's capacity to undertake activities associated with ... looking after country', [26];

- Only the right to negotiate process provides mechanisms that allow the Tarlpa community to assess information relevant to that community when it undertakes activities associated with looking after country; 'no such mechanisms [are] available' under the expedited procedure, [27];

- The Government party appears to be suggesting that it is an appropriate process that, in order to undertake the activities associated with "looking after country", the Tarlpa community should have to wait until late in these proceedings before its solicitors are able to ... be informed of a proposed condition ; ... be given a copy of the ... RSHA; ... analyze the content of the Regional Standard Heritage Agreement; ... inform and advise its clients of these matters; and seek instructions from its clients', [28]; and

- Therefore, even if the RSHA was 'an effective mechanism' for answering the native title party's concerns (which the native title party denies), 'the process of providing the RSHA to the Objector applied in this case would of itself render the RSHA ineffective in addressing those concerns, [29], see also [30]-[32].

The content of a RSHA

[48] The Government party's policy with respect to RSHAs was dealt with by the Tribunal in *Champion v Western Australia* [2005] NNTTA 1; (2005) 190 FLR 362. The policy was developed after extensive consultation between the Government, native title representative bodies and peak industry associations. It was designed principally to deal with issues arising under s 237(b) of the Act. In summary, the Government party requires a grantee party to agree to a RSHA before asserting the expedited procedure in relation to an exploration licence and on this basis, a native title party that had agreed to the use of the RSHA would not in normal circumstances object to the expedited procedure on the basis that the issue of the likelihood of interference with sites, including sites of particular significance to them had been adequately dealt with. Initially a considerable number but by no means all native title parties agreed to the RSHA process. The Tribunal is aware that support amongst native title

parties for the RSHA process has diminished (and is no longer supported by Central Desert Native Title Services Ltd or the native title party in this case) but it is still supported by the Government party. In some cases, including this one, the Government party will also impose the RSHA condition on the grant (referred to above) requiring the grantee party to enter into a RSHA if so requested by the native title party within 90 days of grant. The grantee party has already agreed to enter into the RSHA and this matter has proceeded on the basis that the option exists for the native title party to enter into a RSHA.

[49] In *Champion*, the Tribunal accepted that, while there are regional differences, all RSHAs contain the following features:

- a commitment to co-operate to ensure the ongoing protection of Aboriginal heritage;
- an obligation to take into account activities that could significantly affect cultural heritage and to discuss proposed activities and conduct heritage surveys where appropriate;
- capped daily rates for survey costs and administration fees agreed by both parties which are region specific;
- certainty for grantee parties in undertaking activities for the life of the tenement; and
- 'once-only' execution of an agreement for multiple exploration and prospecting licences within a claim area.

[50] The Tribunal accepts the Government party's contentions and evidence (Government party reply 20 August 2010) in this case that the RSHA, if executed by the native title party, will require the grantee party, among other things, to:

- notify the native title party about proposed on-ground works (whether ground-disturbing or not) and provide detailed information about those works before commencing them (clauses 5 and 6);
- consult with the native title party about surveys of the land in relation to ground-disturbing works before carrying out those works (clauses 7.1 and 7.2);
- carry out surveys with the participation of the native title party prior to commencing ground-disturbing works in some circumstances (clause 7.3-7.12); and

- consult the NTP before applying for any consent under section 18 of the AH Act (clause 10).'

[51] The Government party acknowledges that the Central Desert Native Title Services Ltd and its clients in this case, the native title party, no longer accept the RSHA as being an adequate means of dealing with issues under s 237 of the Act.

[52] In regard to the RSHAs and s 237(b), the Tribunal held in *Champion* that:

- the existence of an RSHA executed by a grantee party does not form a basis for finding in every case that the expedited procedure is attracted even if s 237(b) is the only matter in issue [29], [49];

- the existence of a RSHA is not irrelevant to a s 237 inquiry (see the discussion in *Leonne Velickovic on behalf of the Widji People/Westex Resources Pty Ltd/Western Australia*, NNTT WO03/386, [2004] NNTTA 13 (4 March 2004), Daniel O'Dea at [47]-[50]);

- the proposed government condition on the grant (that within 90 days of the grant, if the native title party requests in writing that the grantee execute an RSHA, the grantee will do so within 30 days) can be taken into account as one of the relevant factors in determining s 237(b) [33];

- the Tribunal's task in relation to s 237(b) will be to assess the evidence regarding whether there are sites of significance in the area and whether the regulatory regime is sufficient to make interference with them unlikely, [34];

- in making a predictive assessment in relation to s 237(b), the Tribunal will have regard to a grantee party's attitude to entering an RSHA and other evidence of the grantee party directed toward Aboriginal heritage, [30], [34], [49];

- the weight given to the execution of an RSHA by the grantee party will depend on the circumstances of the case, [31];

- it is not the role of the Tribunal to endorse one heritage agreement over another, [46]; and

- there is no statutory or legal obligation on a grantee party to sign a heritage agreement, [48].

[53] The principal issues dealt with by the Tribunal in *Champion* in relation to the RSHA related to s 237(b), which is not in issue in this matter.

[54] In short, the Government party's contention in relation to the RSHA and s 237(a) is that the processes required by it, which the native title party has the option to enter into, will enable the native title party to properly exercise its responsibilities to look after country and, consequently, that there will be no interference of the kind contemplated by s 237(a) of the Act. I can accept this contention to the extent that it says that the RSHA provides some capacity for the native title party to exercise these responsibilities, particularly in relation to sites. However, I agree with the native title party that the RSHA does not cover all the activities which the native title party asserts are likely to be interfered with. The regulatory regime does not enable the native title party to exercise those responsibilities to the extent of ensuring that no sites are interfered with as a Ministerial discretion exists permitting interference to occur in some circumstances. Further, the RSHA is principally concerned with the issue of site protection. The evidence of Messrs Ashwin and Langford indicates that the carrying on of the community activity of looking after country extends beyond the issues of potential interference with a site of particular significance to them. Even though the RSHA would require the grantee party to give notice about proposed on ground works, this does not mean that it provides a mechanism for dealing with all aspects of the native title party's responsibility to look after country.

[55] My finding in relation to the considerable number of contentions and the evidence devoted to this topic is that the RSHA is of minor relevance to my determination because the issue to be decided, following the native title party's amendment of its contention, is confined to s 237(a) and whether the grant is likely to interfere directly with carrying on of the community activities associated with 'looking after country' as identified in the evidence in this case. The existence of a RSHA cannot be a complete answer to this question.

History and interpretation of s 237(a) as amended

[56] Although the final formulation of the native title party's contentions makes an analysis of the history of s 237(a) less important than it might otherwise have been, I think it helpful to summarise previous decisions in relation to it**.**

[57] At present, following amendments effected by the *Native Title Amendment Act 1998* (Cth) (the 1998 amendments), s 237(a) provides that a future act is an act attracting the expedited procedure if:

> 'The act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders ... of native title in relation to the land or waters concerned.'

[58] Prior to the 1998 amendments, it provided that:

> 'A future act is an act attracting the expedited procedure if ... the act does not directly interfere with the community life of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned.'

[59] In *Smith/FC* French J considered the interpretation of s 237(a) as amended by the 1998 amendments. The first issue was what the word 'likely' meant in the context of s 237(a). The Tribunal has summarised these findings in many subsequent determinations. However, since s 237(a) is at the heart of this matter, the relevant passages of French J's reasons for judgment are set out here in full.

[60] In *Smith/FC* French J found that:

> 'It was submitted that the amendment to s 237 reflected a legislative intention to require a predictive assessment of the effects of the proposed future act in accordance with the approach taken by Carr J in the *Ward* case, rather than that adopted by the Full Court in *Dann* [*Dann v Western Australia* (1997) 74 FCR 391]. In my opinion that it is the plain intention behind the amendments to s 237 and that intention is effected by the language that has been used. The Tribunal is therefore required to assess whether, as a matter of fact, the proposed future act is likely to give rise to the interference or disturbance referred to in pars (a), (b) and (c) of s 237. That involves a predictive assessment not confined to a consideration of the legal rights conferred by the grant of the proposed tenement. The requirement for a predictive assessment however does not mandate that interference or major disturbance of the kind contemplated by the section must be established or negated on the balance of probabilities. The Act is beneficial and the right to negotiate regime is an element of the protection of native title which is one of the main objects of the Act. That protection is not to be narrowly construed. The term "likely" in this context is not directed to a judgment on the balance of probabilities as to interference or major disturbance. ... . Consistently with the objects of the Act, the word "likely" requires a risk assessment by the Tribunal that will exclude from the expedited procedure any proposed act which would involve a real chance or risk of interference or major disturbance of the kind contemplated by s 237. Such an approach to the construction of the word "likely" is familiar in Australia although it depends upon the particular statutory context in which the word is used ... . In my opinion the Tribunal was correct in the approach that it took to this aspect of the construction of s 237', [23].

[61] The second issue was what 'interfere directly' meant in the context of s 237(a). The question of law dealt with by French J in that case as raised by the native title party was that:

> 'The Tribunal having concluded that hunting and camping, as community and social activities, were carried out by the native title party on the area of the tenement, misdirected itself as to the meaning of the words in section 237(a) of the Native Title Act 1993 in concluding that the grant of the tenement and the exercise of the rights it creates is not likely to interfere directly with community or social activities of the persons who are native title holders in relation to the land or waters concerned.' [17]

[62] In particular, the native title party argued in *Smith/FC* that the Tribunal had misdirected itself as to the meaning of 'directly' in the context of s 237(a). According to French J, the native title party submitted that it should be interpreted so that:

> '[I]f there is a collision course possible at any time or any place between the carrying out of any of the community and social activities and the exercise of rights pursuant to the future act, if each party exercises its rights to the full, then there is a direct interference with the activities of the applicant. It is said not to matter that such collisions might be infrequent or that they might in some circumstances be avoided. If the native title party would be in a position to choose to carry out a community or social activity on a part of the proposed mining tenement area without the existence of the future act, and is not in a position to make that choice, or is inhibited in making that choice, because of the future act, then the future act would have a direct effect of interference with those activities.' [25]

[63] His Honour rejected this submission and found that:

> '[26] The criterion of direct interference in par (a) may be thought of more fruitfully as functional than as definitional. That is to say, it is more usefully regarded as a direction to the Tribunal about its approach to an essentially evaluative judgment than as a definition of a class of consequence which, if attaching to a future act, would take it outside the scope of the expedited procedure. This direction to the Tribunal does not require precise and semantically correct cause and effect analysis in every case. Simple causal analysis in this context would rarely yield a primary cause and effect with no other cause intervening. The notion of direct interference involves rather an evaluative judgment that the act is likely to be a proximate cause of the apprehended interference. And the concept of interference itself is to some degree evaluative. It must be substantial in its impact upon community or social activities. That is to say trivial impacts or impacts which are not relevant to the carrying on of the community or social activities are outside the scope of the kind of interference contemplated by the section.
>
> [27] The evaluation is contextual. The extent of interference and the proximity of its causal connection to the future act proposed should not be considered in isolation. In assessing the risk of direct interference generated by a future act the Tribunal is entitled to have regard to other factors which so affect community or social activities that the impact of the proposed future act is insubstantial. It is that kind of assessment which the applicant in this case regards as impermissible. In my opinion, however, it reflects a commonsense approach to the question posed for the Tribunal which was reflected in the approach which it took in this case. To have regard to the constraints already imposed on the community and social activities of the native title claimants by third parties and external regulation is a legitimate element of the assessment of the extent of interference flowing from the proposed act. Counsel for the applicant accepted that it was this issue that was at the core of his argument. It was put to him in the course of oral argument that what the ground really boiled down to was that the Tribunal, by implication, had suggested that interference was not direct if there were

other concurrent impacts in the light of which the impact of the proposed future act was assessed. It was the applicant's position that what the Tribunal should have done was simply look at the impact of the proposed future act.

[28] In my opinion, the Tribunal's approach was correct. In so saying, I refer to the question of law raised by the first ground of appeal. The factual assessment made is not susceptible of review in these proceedings. There was no error of law and the first ground of appeal fails.'

[64] In *Silver* (at 22-27 [49]-[62]) Deputy President Sosso provided the following useful summary of the history of s 237(a), with which I agreed in *Walley* (at 442-449 [13]-[21]).

'Legal issues

49 Section 237(a) was considered by French J in *Smith v Western Australia*. His Honour made the following observations:

(a) interference must be substantial in its impact upon community or social activities. Trivial impacts or impacts that are not relevant to the carrying on of the community or social activities are outside the scope of the kind of interference contemplated by s 237 (at 451);

(b) the criterion of "direct" interference is functional rather than definitional. The Tribunal does not have to engage in a semantic cause and effect analysis, rather an evaluative judgment is required that the act is likely to be a proximate cause of the apprehended interference (at 451);

(c) the analysis is contextual, and not considered in isolation. In assessing the risk of interference the Tribunal is entitled to have regard to other factors that so effect community or social activities that the impact of the proposed act is insubstantial. Regard can be had to constraints already imposed on the community and social activities of claimants by third parties and external regulation (at 451);

(d) he did not have to decide the issue whether non-physical aspects of the carrying on of community or social activities can be taken into account (at 452).

50 Prior to French J's decision in Smith, s 237(a) had been the subject of considerable comment and analysis by the Federal Court and the Tribunal. Most of the comment related to the issue whether direct interference was limited to physical interference with community life (which term was then used in par (a) or could also include spiritual and like activities. This issue was resolved by Carr J, who determined in Ward v Western Australia that the "spiritual part of life falls quite readily, as a matter of ordinary language, into what is encompassed by 'community life'" (at 223). His Honour did not think that s 237(b) "covered the field" so far as spiritual issues were concerned, and that the interference referred in par (a) went beyond areas or sites of particular significance and focused on direct interference with community life. The direct interference referred to could be unrelated to sites of significance, and his Honour gave the following extremely liberal interpretation: ". . . the very thought of intensive exploration activities, perhaps involving vehicles, bulldozers and other heavy equipment and setting up of seismic lines on hunting grounds 10 kilometres away, could upset an Aboriginal community and directly interfere with its community life without any physical interference with that life." Prior to the 1998 amendments to the Act this particular interpretation was not the subject of any other Federal Court analysis, and remained good law until the wording of s 237(a) was changed by the Federal Parliament.

51 Prior to the 1998 amendments s 237(a) referred to direct interference with "community life". Now, of course, the paragraph refers to "community or social activities". When the Federal Government first introduced amendments to the Act in 1997 it proposed to amend s 237(a) by deleting the words "does not directly interfere with" and replace them with "is not likely to interfere directly with the physical aspects of ". The explanatory memorandum circulated to the *Native Title Amendment Bill 1997 (No 2)* (Cth) gave this overview of the reasons for this proposed change. [at 20.39]

> "The first change addresses a Federal Court decision (*Ward v Western Australia* (1996) 136 ALR 557) and provides that an act will only attract the expedited procedure in s 32 if it is not likely to (rather than 'does not') interfere directly with the physical aspects of community life. If there is evidence that the act will interfere with native title claimants' physical ability to enjoy their native title rights, for example, placing an impediment to hunting, fishing or gathering or the ability to conduct religious ceremonies, the expedited procedure will not apply."

52 Both the Federal Opposition (in April 1998) and Senator Harradine moved amendments in the Senate to this particular amendment. The later amendments were designed, inter alia, to ensure that the issue of spiritual beliefs/attachment could still be taken into account in s 237(a). On 3 July 1998, the Prime Minister introduced amendments to the *Native Title Amendment Bill* into the House of Representatives. Amendment 42 introduced the current version of s 237(a): House of Representatives *Parliamentary Debates*, 3 July 1998 at 6038. The supplementary explanatory memorandum circulated by the Prime Minister contained these comments on the amendment: "This amendment replaces item 42 in the Bill which deals with one of the criteria for determining whether the future act (such as the grant of an exploration lease or licence) attracts the expedited procedure. The effect of replacement paragraph 237(a) is that the procedure can only apply if the grant of the lease or licence is not likely to interfere directly with the carrying on of the community or social activities of native title holders." On the same day in the House of Representatives, the Leader of the House (the Honourable P Reith MP) presented reasons why the Government did not accept amendments moved in the Senate. With respect to Opposition amendments 209 and 210 the following statement was made (at 6066): "These amendments are made to s 237 which relates to the expedited procedure. As the effect of these amendments have been modified by the House of Representatives the Senate versions have been rejected." No other official explanation was provided for the new wording of par (a).

53 Since the 1998 amendments the Tribunal has on a number of occasions considered contentions to the effect that par (a) deals with both physical and non-physical interference. The uniform response has been that spiritual issues fall outside this paragraph. This line of reasoning commenced with the determination of Franklyn DP in *Western Australia v Smith*. It should be noted that in reaching his conclusion that par (a) was limited to physical interference, Franklyn DP referred (at 45-46) to the explanatory memorandum circulated with the *Native Title Amendment Bill*. As noted, the comments in that explanatory memorandum related to a proposed amendment to par (a) which differed in a significant respect from the wording of the paragraph as it now stands.

54 In this inquiry the native title party has argued that there is only a slim difference between "community life" and "community or social activities". Reference was made to the analysis of Professor Bartlett in *Native Title in Australia* (at 386). The Government party referred the Tribunal to the above determination of Franklyn DP. It should be noted that other commentators have indicated that while, in their opinion, the current wording of s 237(a) is broader than physical interference in community life, there is uncertainty as to whether it encompasses the position enunciated by Carr J in *Ward v Western Australia*: see P Burke, "Evaluating the Native Title Amendment Act 1998" (1998) 3 AILR 333.

55 In the absence of any clear explanation provided by the Executive Government of the effect of the change in wording resulting from the 1998 amendments, the Tribunal is required to interpret the words of par (a) to reflect the real intention of the Federal Parliament: *Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379.

56 The first matter that is clear is that par (a) is now focused on community or social *activities*. The paragraph is no longer centred on an examination of community *life* but rather the external manifestation of that life in the form of activities. The *Macquarie Dictionary* defines the noun activity as follows:

> "1. the state of action; doing. 2. the quality of acting promptly; energy. 3. a specific deed or action; sphere of action: social activities."

It is clear that some activities have a spiritual dimension, and that the doing of a future act could interfere directly with those activities. However, if it was to be contended that

par (a) was at issue there would have to be material before the Tribunal that the future act would be likely to have a direct physical interference with *activities* which in turn would impact on the *spiritual dimension* of those *activities*.

57 As French J highlighted in Smith (at 451) any such interference "must be substantial in its impact upon community or social activities. That is to say trivial impacts or impacts that are not relevant to the carrying on of community or social activities are outside the scope of the kind of interference contemplated by the section". As such it would not be enough if only isolated members of a community were upset about the proposed future act. There would have to be evidence that the doing of the act would be likely to substantially interfere with the community or social activities of the native title holders.

58 In addition, the focus of the Tribunal's inquiry is ascertaining the likely interference with activities "by virtue of their native title rights and interests caused by some physical activity in the exercise of rights given" by the future act concerned: see Seaman DP in *Re Nyungah People* (1996) 132 FLR 54 at 65. While the approach of Seaman DP in restricting the inquiry into interference to community life to physical interference only was, as previously mentioned, rejected by Carr J in *Ward v Western Australia*, there was one important point of agreement. Carr J made this observation (at 223 and 224-225):

> "Mr Sumner treated the expression 'community life' in a wide sense as including activities such as hunting, gathering and collecting of bush food and bush medicine. The respondents had no quarrel with that approach and, in my view, it was the correct one . . . I accept Mr Ritter's submission that s 223 of the Act (which defines the expressions 'native title' and 'native title rights and interests') gives some indication of the breadth of community life with respect to land. For example, there is express reference to traditional laws and traditional customs which may have a connection with land."

In short, the Tribunal's inquiry is not directed at ascertaining the likely interference with activities per se, but, rather, those activities which are a manifestation of claimed native title rights and interests.

59 The term "community" has been the subject of varied interpretations, depending, as it inevitably does, on the context in which that term is used. Illustrative of this principle is the Canadian case of *National Council of Jewish Women of Canada, Toronto Section v North York (Township)* (1961) 30 DLR (2d) 402, where the following observations were made by Porter CJO (at 404):

> "The term 'community' has been applied in a variety of ways. It has been used to apply to the quality of holding goods in common; to society or the social state where life is in association with others; to a body of individuals having common or equal rank; to those members of a civil community, who have certain circumstances of nativity, religion or pursuit common to them, such as religious communities; to a socialistic or communist society; and to a body of persons living in the same locality, `those little communities which we express by the term neighbourhood'."

However, when considering the term "community" in the context of the Act an appropriate starting point are the comments of Sumner DP in *Re Cheinmora* (1996) 129 FLR 223 at 227:

> ". . . there is not an agreed general concept of community amongst anthropologists but that each case has to be examined in context. There could be a residential community, a localised community, or a community of elders. A community is not always a group of people living in a particular locality."

See also *Smith v CRA Exploration Pty Ltd* (1996) 133 FLR 251 at 256.

Reference can also be made to the following observations of Merkel J in *Shaw v Wolf* (1998) 83 FCR 113 at 122:

> "Community, like identity is a social construct. A community may be a human settlement within a particular locality, a local social system, comprising a set of relationships that take place wholly or mostly within a locality, or it may embrace a type of relationship between geographically dispersed individuals having some common sense of identity."

See also the report of the Queensland Land Tribunal into *Aboriginal Land Claims to Mungkan Kandju National Park and Unallocated State Land near Lochinvar Pastoral Holding*, May 2001 Chairperson Neate, Members Martin and Webster (at 52-53).

Consequently when the term ``community activities'' is used in par (a) it is not necessarily limited to the activities of a particular residential or localised community: see *Hollow v State Planning Authority* (1980) 27 SASR 34 and *R v Liquor Commission (NT); Ex parte Pitjantjatjara Council Inc* (1984) 31 NTR 13.

Regard should also be had to the comments of Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 where his Honour said (at 61):

> "But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed."

As these comments of Brennan J highlight, while native title is by its very nature a communal concept: see *Risk v Native Title Tribunal* [2000] FCA 1589 and *Tilmouth v Northern Territory* (2001) 109 FCR 240 native title holders do not necessarily have to reside in a particular locality. As native title is communal, if evidence is adduced which is not rooted in the collective experiences of a geographically localised group of persons, then material would need to be presented to identify these individuals as a community and then to demonstrate the native title dimensions of this community of persons.

60 The adjective "social" is given the following explanation in the Macquarie *Dictionary*:

> "1. pertaining to, devoted to, or characterised by friendly companionship or relations; a social club . . . 4. living, or disposed to live, in companionship with others or in a community, rather than in isolation . . . 6. of or pertaining to the life and relation of human activities designed to remedy or alleviate certain unfavourable conditions of life in a community, esp among the poor."

The *Oxford English Dictionary*, 2nd ed (1989) provides the following definitions of "social":

> "1. Capable of being associated or united to others . . . 2. Associated, allied, combined . . . 4. marked or characterized by mutual intercourse, friendliness or geniality; enjoyed, taken, spent etc in company with others, esp with those of a similar class or kindred interests."

In the context of par (a) if the term "social activities" is to be given a meaning that comprehends external manifestations of human behaviour that fall outside "community activities" then it would only be those social manifestations of traditional laws and customs which nevertheless are grounded in the communal concept of native title. It would not usually extend to cover activities of individuals: the focus of par (a) is towards the likely impact of the future act on the activities of the native title claim group. Nevertheless in some circumstances individual or small group activities would be covered. This is the case where those activities have a wider social dimension. In other words the activity in question is not of relevance only to the individual doing the act, but has a dimension that transcends the person involved.

61 There is a difference in the wording of par (a) both before and since the 1998 amendments. The pre-1998 amendment paragraph did not have a likelihood requirement and, more importantly, was focused on the wider concept of community life. Community life, can connote, as Carr J held, all types of spiritual matters and activities. The mere thought of exploration activity could cause upset, and thus interfere with that community life. However, it would seem that the post-1998 wording of par (a) is focused on the active manifestation of that community life in the form of community and social activities. While it would be artificial, in my opinion, to give an unduly restrictive interpretation to par (a) to inevitably exclude any form of spiritual dimension, it would be just as clearly wrong to read into the new s 237(a) the type of conclusion reached by Carr J in *Ward*.

> 62 To sum-up, and with due respect to the native title party and Professor Bartlett, there is a very clear change in the wording of this paragraph. The difference is not slight. I am not prepared to go so far as to exclude all forms of non-physical aspects of community or social activities, but on the other hand, if there be a spiritual dimension it must be rooted in activities.'

The Tribunal's approach to the interpretation of s 237(a) as amended

[65] Both the native title party and Government party have relied on [20.39] of the original Explanatory Memorandum (EM) to the 1997 Bill which was introduced to amend s 237(a): native title party's further reply of 18 October 2010 at [7]-[8] and Government party's reply of 5 October 2010 at [9]. As DP Sosso has pointed out in *Silver*, the original amendment proposed that s 237(a) be amended to refer to the '*physical aspects of community life*' of the native title holders whereas the amendment as finally passed refers to their '*community or social activities*'.

[66] The original EM referred to a clause which was subsequently amended without explanation by way of further EM and for this reason I do not think it can be automatically accepted as expressing the final intention of the legislature in interpreting the current s 237(a). However, in my view, the law as applied by the Tribunal since the 1998 amendments does now require there to be evidence of direct interference with the community or social activities of the native title party which are of a physical and not purely spiritual nature for the expedited procedure not to be attracted.

[67] Nothing has occurred since the determinations in *Silver* and *Walley* to cause issue to be taken with the approach of the Tribunal to the 1998 amendments. However, the following comments are made in the context of the contentions raised in this case.

[68] First, DP Sosso's references to the extrinsic material contained in the EM and parliamentary debates can be supplemented by the following additional information which confirms the approach taken by the Tribunal to this issue.

[69] When the Bill was debated in the Senate on 8 April 1998, the Opposition moved an amendment to s 237(a) so that it read 'does not interfere directly with the actual functioning of the way of life of the community': Commonwealth, *Parliamentary Debates*, Senate, 8 April 1998, 2469 (Senator Bolkus). In response Senator Nick Minchin, the Government Minister with carriage of the legislation, told the Senate that the Government opposed this amendment because:

> 'The expedited procedure is rapidly losing any real attraction because of judicial interpretation of it. It is not working in the way intended. Increasingly, there are objections to it. That means, regrettably, that things then have to all end up going through the right to negotiate process. We think our restructuring of the expedited procedure will enable it to work effectively for everybody concerned, without overriding or denying the spiritual importance of land to Aboriginal people, which we acknowledge. It is important that the expedited procedure is able to be put in place without mere assertions about spiritual connection meaning that it can never be used': Commonwealth, *Parliamentary Debates*, Senate, 8 April 1998, 2469.

[70] As DP Sosso pointed out, the Supplementary EM to the Native Title Amendment Bill 1997 [No 2] provided with the Government amendments made in July 2008 is not helpful in determining what, if any, significance should be given to the background to the changes made to s 237(a) because it merely restates what is said in what became s 237(a).

[71] Although Senator Minchin's statement on 8 April 1998 was not contained in a second reading speech or included in the Supplementary EM, it can be relied on to confirm the Tribunal's approach. While the Executive Government did not want to override or deny 'the spiritual importance of land to Aboriginal people', it did want to put in place an expedited procedure that worked 'effectively for everyone concerned' and 'without mere assertions about spiritual connection meaning that it can never be used'. This indicates that the Executive Government's intention to address the findings in *Ward v Western Australia* [1996] FCA 1452; (1996) 69 FCR 208; (1996) 136 ALR 557 were as found by DP Sosso.

[72] Although in some cases it appeared that there might have been minor differences in approach between members of the Tribunal about the relevance of spiritual activities to the effect of s 237(a) (see discussion in *Walley* (at 447-449 [14]-[21]), *Drury v Western Australia* [2002] NNTTA 171; (2002) 170 FLR 182 per Deputy President, the Hon E M Franklyn QC (at [17]) (*Drury*), these have been clarified in subsequent determinations.

[73] In *Drury*, DP Franklyn (adopting the legal principles relating to the meaning of s 237(a) set out in *Walley*) commented on the extent to which spiritual activities are encompassed within s 237(a) as discussed in *Silver* and *Walley*. He expressed the view that there is no real distinction between these views and those expressed by him in *Western Australia v Smith & Ors* [2000] NNTTA 239; (2000) 163 FLR 32 (*Smith/DP Franklyn*). In *Drury*, DP Franklyn said the subsection is directed to interference directly with the physical aspects of the relevant activity, whether or not it has a spiritual dimension, and summarised his approach as follows:

> '[17.1] I find no real distinction between my conclusion in *Smith v Western Australia* (2001) 163 FLR 32 that s 237(a) is concerned with and limited to interference with the physical aspects of the carrying of community or social activities and those of Member Sosso in Silver referred to by Sumner DP in *Walley*. My conclusion did not and was not intended to negate any spiritual dimension attaching to such an activity. Member Sosso said (at 27 [61]) "it would seem that the post-1998 wording of par (a) is focused on"; (at 24 [56]) he said that, in the event of an issue as to the effect of s 237(a), "there would have to be material before the Tribunal that the future act would be likely to have direct physical interference with activities which would in turn impact on the spiritual dimension of those activities". It seems clear therefrom that there is no dispute that the subsection is directed to interference directly with the physical aspect of the relevant activity, whether or not it has a spiritual dimension and wherever it is carried on.
>
> [17.2] In my opinion, in construing s 237(a), it is necessary to first identify the activity in question. To that end it is necessary to have evidence of its nature. It may or may not be spiritual in nature or have a spiritual dimension. It is then necessary to identify from the evidence how the activity is carried on in the sense of how it is conducted. That in my view involves a consideration of the physical aspects of the carrying on of the activity as disclosed by the evidence. The next step is to assess whether the carrying on of the activity is likely to be interfered with directly by the future act. That requires a predictive assessment as to how (if at all) implementation of the future act is likely to impact on the carrying out of the activity. Section 237(a) is directed expressly to the issue of the likelihood of interference directly with 'the carrying on', ie. the conduct, of the activity. A distinction between the activity as such, and the physical aspects of carrying it on, is there apparent. In my opinion, that the nature of the relevant activity may have a spiritual dimension does not directly impact on the question whether the future act is likely to interfere directly with the carrying on of that activity. It may be that the 'carrying on' involves some physical act or acts which have spiritual significance, but in such case it is nevertheless the 'carrying on', i.e. the physical conduct of the activity, with which the subsection is concerned. Prior to the 1998 amendment s 237(a) was concerned with interference with 'communal life'[sic]. That term necessarily involved consideration of interference with aspects of community life which did not necessarily involve physical activity.'

[74] In *Cheinmora and Others v Heron Resources Ltd and Another* [2005] NNTTA 99; (2005) 196 FLR 250 Member Dan O'Dea expressed his views as follows (at [33]):

> 'The native title party contends that community and social activities can have a spiritual dimension, citing in support of this contention ***Walley*** at [13]–[21], in which the Deputy President Sumner considered the differing views of Tribunal members in relation to this issue. I have considered this contention in a previous enquiry (Dora Sharp & Ors on behalf of *Gooniyandi Native Title Claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western Australia* [2004] NNTTA 31 (7 May 2004) at [29]) and I agree with the position of Deputy President Sumner at [14] in *Walley*, concurring with the views of Sosso in Silver, to the effect that any spiritual dimension to community and social activities must be rooted in those activities.'

[75] In summary, it is my view that, since the 1998 amendments, the Tribunal has always acted on the basis that, in a practical sense, the community or social activities encompassed by s 237(a) are essentially physical activities, even if they are carried out because of the spiritual relationship that a native title party has to the relevant land. In *Smith/FC* (at [29]), French J declined to decide whether DP Franklyn was correct to say in *Smith/DP Franklyn* (at 45, [22]) that s 237(a) 'is concerned with and limited to interference with the physical

aspects of the carrying on of community and social activities of the native title holders' because the appellant was not relying upon any non-physical aspect of activities of the native title holders in that matter. Since *Smith/FC*, the Federal Court has not been called upon to deal with this issue and the Tribunal has continued with the approach described above.

[76] The native title party's amended contentions make it clear that its case is based on the community or social activities identified in the evidence of Messrs Ashwin and Langford being physical activities carried out by the native title holders (i.e. the native title party) which are capable of being interfered with by the grant of the exploration licence.

[77] This case does not concern 'mere assertions about spiritual connection', to use Senator Minchin's words, but whether certain activities associated with the native title holders' obligation to 'look after country' are 'the community or social activities of the persons who hold ... native title in relation to the area ... concerned', and, if they are, the likelihood that the doing of the act in question in this case will interfere directly with the carrying on of those activities.

What 'activities' are identified by the native title party in this case?

[78] According to the native title party's further reply of 18 October 2010 at [14], the evidence of Mr Ashwin and Mr Langford identifies a series of physical activities that are undertaken as part of the community life of the Tarlpa native title holders which fulfil their duty to 'look after country' and involve, inter alia:

- a process of consultation and discussion designed, if necessary [and if possible] to reach a negotiated agreement;
- a negotiated agreement, that is [in this matter], an agreement 'that makes the [grantee party], look after land the way we do'; and
- the capacity to ensure that the negotiated agreement is complied with.

The omitted footnotes refer to paragraphs 10, 11, 18 and 19 of Mr Ashwin's affidavit.

[79] The native title party goes on to contend (at [15]) that the particular activities associated with 'looking after country' relevant to this matter are:

- discussing with the community the proposed activities of the grantee party;
- meeting, negotiating and [if possible] reaching agreement with the grantee party on how it conducts its exploration activity; and
- ensuring that the grantee party has complied with any obligations it has agreed to, while conducting its exploration activities and at the cessation of those activities: native title party further reply, 18 October 2010.

[80] I accept the contentions and evidence of the native title party on the nature of the community activities. In my view, there is a physical dimension to all these activities and they are community activities of the native title holders (i.e. the native title party) in relation to the land or waters concerned. Meeting, negotiating, reaching accord and monitoring compliance with an agreement all have a physical dimension.

[81] The evidence is that activities associated with 'looking after country' are likely to be community rather than social activities: see affidavit of Mr Ashwin at [12] and Mr Langford at [7]. Most of the contentions are also based on it being a community activity: see, for example, the native title party reply 27 August 2010, [29], native title party further reply 18 October 2010, [7], [15], [16], [18], [21], even though the native title party's further reply of 18 October 2010, refers to 'all of the community or social activities described in the affidavits' of Mr Ashwin and Mr Langford: at [23], [31](b). In my view, the activities identified are community rather than social activities but the distinction between the two is of no importance to my determination.

Must the community or social activities take place on the proposed licence area?

[82] The second issue considered in *Silver* and raised by the parties' contentions is whether the community or social activities must take place on the area of the proposed licence.

[83] The native title party's further reply filed 18 October 2010, says that: "The Objector's evidence does not and is not intended to identify any 'physical' community activities carried out within the area of the proposed tenement" (at [5]), because s 237(a) 'neither mentions nor requires that those community activities are limited to those physical activities undertaken within the area of the proposed tenement'. Rather, a future act will be excluded from the expedited procedure if there is a likelihood that the community or social activities of the

native title holders for the area concerned will be directly interfered with if the future act is done, regardless of where those activities take place.

[84] With the following qualifications, the Tribunal accepts the native title party's position. The Tribunal has held (*Silver* at [35]) that there may be community or social activities carried out or sites of particular significance to a native title party which are not on the area of the proposed tenement but which could still be interfered with in the sense contemplated by s 237(a). In *Silver*, it was said that '... the fact that [the carrying on of] community or social activities in the nearby community of Kewulyi [consisting of members of the native title claim group] may be directly interfered with by the future act can be considered', as can activities of a grantee party outside of the area of the proposed tenement.

[85] I agree with the views expressed in *Silver* that, for instance, a site could be adjacent to a road which an explorer might use or which it might need to make to the relevant area. Likewise, there could be community or social activities in an Aboriginal community comprising members of a native title claim group which could be interfered with directly if an explorer set up an exploration camp nearby and the explorer's employees had ready access to the community. However, whether or not the direct interference referred to in s 237(a) is likely to occur will depend on the facts of each case. In practice, the further the activities are from the relevant area, the less likely there is to be the relevant interference. I agree with the observation of DP Sosso that 'if it is suggested that off-site activities be taken into account, then there must be a clear nexus between those activities and issues being considered under s 237': *Silver,* [35]

[86] Where the community or social activities being carried on are activities such as hunting, fishing, camping or the doing of ceremonies and other cultural events, and they are carried on in situ, then direct interference may be more likely than in a case where the activities may be done wherever the persons who hold native title happen to be at the time those activities are done. In other words, the likelihood of direct interference may become more remote, depending on the circumstances.

[87] The Government party contends that the fact that there are no Aboriginal communities in the relevant area 'is a relevant and important consideration for the Tribunal': Government party contentions, 12 July 2010, [65]. I agree with the Government party's contentions but only to the extent that the presence of members of the native title party claim group or a

community of native title holders on, or in the near vicinity of, the tenement area could, as a matter of fact, make direct interference with the carrying on of their community activities more likely. However, the presence or absence of an Aboriginal community or the carrying on of community or social activities of native title holders on the area of a proposed tenement is not a consideration which on its own is definitive as to whether the carrying on of those activities is likely to be interfered with.

[88] However, in a practical sense, the fact that there is a physical community made up of members of the native title claim group on or near the proposed tenement area (as there was in *Silver*) will be relevant to whether or not the future act would be a proximate cause of the alleged interference where (as in *Silver*) the community or social activities relied upon are hunting, camping, fishing or ceremonial activities conducted by members of the native title claim group. For example, activities of that kind may be carried on by various claim group members at great distances from the proposed tenement are. They may still answer the description of 'community or social activities' of the persons holding native title to that area but it may be difficult (although not impossible) on the facts to show that the grant of the tenement, and the activities undertaken as a result, would be a proximate cause of any direct interference with carrying on those community or social activities because of the geographical distance.

[89] This case has proceeded on the basis of the concession from the native title party that none of the community activities it relies upon take place physically on the proposed licence area, even though some of them, such as visiting waterholes in order to maintain them - Mr Langford's affidavit at [9] - potentially could occur on the area. I can infer that the activities take place at places where they reside or places where they come together for the meetings and discussions referred to in the evidence. Mr Ashwin resides at Windidda Community which is 25 kilometres east of Wiluna. Aboriginal people live in the town of Wiluna and in surrounding areas. I can infer some of them are part of the native title party. I can infer that this is principally where the community activities of looking after country as relied on by the native title party take place. However, for the reasons given, the native title party's concession does not automatically result in a finding that there is not likely to be interference with the carrying on of the native title party's community activities but it increases the potential for such a finding on the basis that the interference (if any) is not

caused in a direct or proximate way by the grant of the exploration licence and the proposed exploration activities.

Is native title a communal concept?

[90] The third issue arising from DP Sosso's reasons in *Silver* is that, since that decision, there have been some statements from the Federal Court to the effect that native title may not necessarily be a communal concept.

[91] In *Bodney v Bennell* [2008] FCAFC 63; (2008) 167 FCR 84, the Federal Court (Finn, Sundberg and Mansfield JJ) said that:

> 'This Court ... has refrained from turning the "fundamental principle" of *Mabo (No 2)* [i.e. native title is communal] into an inveterate rule, acknowledging in this that each case will depend on its own facts', [151].

[92] In my view, whatever position is the correct one on this issue, it does not impact on DP Sosso's conclusions in *Silver* and does not affect the manner in which this case is to be determined. The application for native title made by the native title party (WC07/3) asserts that the claim group 'comprises those Aboriginal people who hold in common the body of traditional laws and customs governing the area covered by this application', thus affirming the communal nature of native title claimed in this case.

Must the community or social activities arise from registered native title rights and interests?

[93] The fourth issue is whether the community or social activities must be manifestations of the *registered* native title rights and interests; or, alternatively the *claimed* native title rights and interests? In *Silver* at [58], DP Sosso found that the Tribunal's inquiry for the purposes of s 237(a) is directed at ascertaining the likelihood of interference with those activities which are 'a manifestation of claimed native title rights and interests'. He also said (at [45]) that, in an expedited procedure objection inquiry, the Tribunal must deal with registered native title rights and interests. This position was also confirmed in *Ward v Northern Territory* [2002] NNTTA 104; (2002) 169 FLR 303, [56]-[59], where DP Sosso also said that the community or social activities must not be any generic activities but specifically activities that identify the persons carrying on those activities as native title holders.

[94] In *Walley* at [13], after noting this finding, the Tribunal commented that 'the plain and ordinary construction of the words' in s 237(a) could be said to mean that 'any activities are covered (for instance, an Aboriginal community football carnival which is a common social and community activity in some parts of Australia)'. However, it was also noted that, on the other hand:

- one of the main purposes of the Act is the protection of native title;
- the objection to the expedited procedure is part of the protective process; and
- the reference to community or social activities in s 237(a) occurs in that context.

[95] Therefore, on balance, the Tribunal in *Walley* accepted the views expressed in *Silver* on this issue but noted (at [14]) that 'the issue is unlikely to be of great practical consequence' because 'there is interference of the kind referred to in s 237(a) it is almost certain to relate to activities connected with native title even if other unconnected activities are also affected.'

[96] On the issue of whether it is sufficient for the community or social activities to arise from the claimed, as opposed to the registered, native title rights and interests, it could be argued that s 237(a) should not be read too narrowly, i.e. it should be read to embrace the all of the native title holders' community or social activities, provided those activities are a manifestation of the claimed native title rights and interests, whether those rights and interests are registered or not. On the other hand, if the expedited procedure does not apply so that the claimants have the right to negotiate, s 31(2) provides that the other negotiation parties cannot be found to have failed to negotiate in good faith with the native title party as required by s 31(1)(b) simply because those parties (or any one of them) failed or refused to negotiate about 'matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties'. On this basis, the community or social activities must arise from the registered native title rights and interests. So, if the activities associated with the obligation to look after country identified in this matter are not a manifestation of any of the relevant registered rights and interests, then the Act does not require the other parties to negotiate in relation to those activities under the right to negotiate and they would, on this view, have no place in my consideration of s 237(a).

[97] In this case, as noted above, 99.5 per cent of the area concerned is subject to a non-exclusive pastoral lease and the other 0.5 per cent covered by various reserves. Therefore, prima facie at least, none of the area concerned is able to be subject to a determination recognising a native title right to possession, occupation, use and enjoyment as against the whole world (exclusive native title): see *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1; (2002) 191 ALR 1 at [187]-[192], [219], Gleeson CJ, Gaudron, Gummow and Hayne JJ and the Government party contentions 12 July 2010, at [69](e).

[98] However, despite this situation, the native title rights and interests claimed are divided into two types – exclusive and non-exclusive – both of which have been registered. Schedule E of the Tarlpa claimant application (WAD248/2007, WC07/3) describes the claimed native title rights and interests as follows:

> '1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply), the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters of the area covered by the application to the exclusion of all others, pursuant to the traditional laws and customs of the claim group, including:
>
> (a) the right to speak for the area covered by the application;
>
> (b) the right to be asked permission to use the land and waters of the area covered by the application;
>
> (c) the right to live on the area covered by the application;
>
> (d) the right to make decisions about the use, enjoyment and management of the land and waters of the area covered by the application;
>
> (e) the right to hunt and gather and to take water and other resources (including ochre) on the area covered by the application;
>
> (f) the right to control access to and activities conducted by others on the lands and waters of the area covered by the application;
>
> (g) the right to use and enjoy resources of the area covered by the application;
>
> (h) the right to maintain and protect areas of cultural significance to the native title claim group on the area covered by the application;
>
> (i) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the area covered by the application;
>
> (j) the right to trade in resources of the area covered by the application; and
>
> (k) the right to participate, engage in and conduct ceremonial activities and other cultural activities on the area covered by the application.
>
> 2. Over areas where a claim to exclusive possession cannot be recognised, the native title claim group claim the following rights and interests:
>
> (a) the right to access the area covered by the application;
>
> (b) the right to camp on the application area the right to erect shelters on the area covered by the application;
>
> (c) the right to erect shelters on the area covered by the application;
>
> (d) the right to live on the area covered by the application;

(e) the right to move about the area covered by the application;

(f) the right to hold meetings on the area covered by application;

(g) the right to hunt and gather on the area covered by the application;

(h) the right to have access to and use the natural water resources of the area covered by the application;

(i) the right to gather and use the natural products of the area covered by the application (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;

(j) the right to conduct ceremony on the area covered by the application;

(k) the right to participate in cultural activities on the area covered by the application;

(l) the right to maintain and protect places of importance under traditional laws, customs and practices in the area covered by the application;

(m) the right to conduct burials on the area covered by the application;

(n) the right to speak for and make non-exclusive decisions about the area covered by the application;

(o) the right to speak authoritatively about the area covered by the application among other Aboriginal People or Torres Strait Islanders in accordance with traditional laws and customs;

(p) the right to control access to and use of area covered by the application by other Aboriginal People or Torres Strait Islanders who seek access to or use of the lands and waters in accordance with traditional laws and customs;

(q) the right to determine and regulate membership of and recruitment to the native title claim group;

(r) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites.

3. The native title rights are subject to:

(a) the valid laws of the State of Western Australia and the Commonwealth of Australia;

(b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of Western Australia.'

[99] However, a search of the National Native Title Register reveals that:

- rights (e) to (h) in paragraph 1 of the application and registered on the Register of Native Title Claims do not extend to areas over which a claim to exclusive possession cannot be recognised; and

- rights (a) to (m) in paragraph 2 of the application have not been registered on the Register of Native Title Claims

[100] A copy of the delegate's reasons for refusing to register those rights is available at www.nntt.gov.au/Applications-And-Determinations/Registration-Test/Pages/Tarlpa.

[101] The duty to look after country the proper way via carrying on the community activity of ensuring visitors look after country the proper way seems to be reflected in the claimed native title right to 'speak for and make non-exclusive decisions about the area covered by the application'. However, as noted above, this right is not registered on the Register of Native Title Claims. The registered rights at (a) to (m) may be relevant in an indirect way to the community activities relied upon in this matter as it is described in the evidence but they do not seem to embrace that activity as enunciated in the native title party's contentions.

[102] This issue was not raised by either the Government or grantee parties and the case has proceeded on the basis that the community or social activities relied on by the native title party are of the kind covered by s 237(a). Therefore, I consider it appropriate to deal with this issue on the basis of the best case (or most beneficial) scenario from the native title party's perspective, which is that the community or social activities must be a manifestation of the registered native title rights and interests whether of an exclusive or a non-exclusive kind. At this stage of the right to negotiate process set out in the Act, where native title rights and interests are claimed and registered but not determined, the status quo pending a final determination in relation to the claim is best maintained in the context of the expedited procedure by accepting that the community or social activities of the native title party may emanate from any native title rights and interests which are registered without attempting to dissect which areas of land may only be subject to a determination of non-exclusive native title. The community or social activities of the native title holders of looking after country are manifestations of at least some of the native title rights and interests.

Findings on the principal issue (s 237(a))

[103] The foregoing analysis serves to provide the context for what, on the final contentions of the parties, was a narrow issue based on relatively simple facts. I accept that the community or social activities carried out by the native title party of looking after country are as asserted by the native title party and are physical activities which comprise having discussions within the community and meetings about the grantee party's proposed activities, meeting and negotiating with the grantee party with a view to negotiating an agreement on the conduct of exploration, then ensuring the grantee party complies with its obligations. I infer that this activity could also include the native title party's involvement in site surveys and discussions with the grantee party about how to avoid interference with sites of particular significance to them.

[104] The key matter for consideration is the proper meaning and effect of the words 'interfere directly' and 'carrying on'.

[105] Of potential relevance, the word 'interfere' is defined as follows. In the Macquarie Dictionary – 5th edition - 1. to interpose or intervene for a particular purpose, 2. to take part in the affairs of others; meddle, 3. to come into opposition, as one thing with another, especially with the effect of hampering action or procedure. In the New Shortened Oxford English Dictionary (NSOED) – 1. Intermingle, intersperse with, interpose, 2. Of a persons or persons: enter into something without right or invitation or intending to hinder or obstruct (foll by with), ... 4. Clash in opinions, tendencies etc; conflict, 5. Intersect, cross each other, 6. Intervene so as to affect an action.

[106] In my view, the ordinary meaning of 'to interfere' in the context of s 237(a) is action which has the affect of hampering or affecting adversely any community activities of the native title holders. In *Walley* and *Silver*, it was accepted that interference must involve some adverse affect on community or social activities (see also *Ned Cheedy and Others on behalf of Yindjibarndi #1/Western Australia/Cazaly Iron Pty Ltd*, NNTT WO06/529, [2008] NNTTA 39 (4 April 2008), Hon C J Sumner at [26]).

[107] It may be that, to date, not enough has been made of the fact that s 237(a) as amended is actually focused on whether or not the act in question is not likely to interfere directly with 'the carrying on' of the native title holder's community or social activities. The Macquarie Dictionary (5th ed) defines 'carry on' to mean 'to manage, conduct'. The NSOED relevantly defines 'carry on' as: (a) continue, keep up, conduct (a conversation, a business, etc.), advance (a process etc.); (b) go on with what one is doing, continue one's course, be continued. In the context of s. 237(a) it is reasonable to conclude that, 'carrying on' means 'continuing or going on with' the relevant activities or 'keeping up, conducting' those activities.

[108] The question to be answered in this case could be posed as being whether the grant of the exploration licence and the proposed exploration activities are likely to hamper or adversely affect the native title party in continuing, or going on with, the conduct of the community activities associated with looking after country as those activities are described in the native title party's evidence and contentions, in the sense of there being a real risk of this happening.

[109] The key direction from the Federal Court on this issue is in *Smith/French J* (at [26]):

> 'The notion of direct interference involves rather an evaluative judgment that the act is likely to be a proximate cause of the apprehended interference. And the concept of interference itself is to some degree evaluative. It must be substantial in its impact upon community or social activities. That is to say trivial impacts of impacts which are not relevant to the carrying on of the community or social activities are outside the scope of the kind of interference contemplated by the section.'

[110] Further, as DP Franklyn said in *Drury* at [17.2], there is a 'distinction [to be drawn] between the [community] activity as such, and the physical aspects of carrying it on', i.e. s 237(a) is concerned with the likelihood of direct interference with the 'the physical conduct of the activity' in question if the future act is done.

[111] I think it is stretching the intention of s 237(a) too far to conclude that the grant of the exploration licence and the conduct of the exploration activities proposed by the grantee party as described above will directly interfere with the carrying on of the activities relied upon in this matter (see paras [44]-[45] and [78]-[79] above) when viewed in that context. Self evidently, the proposed desk top research does not have that potential. Even the activities which may be carried out on the tenement area involving soil and rock chipping and, eventually, ground disturbing activity in the form of drilling cannot in any direct sense interfere with the carrying on of those activities, i.e. community discussions, meeting, negotiating and (if possible) reaching agreement with the grantee party.

[112] If a native title party regularly camps at a particular spot and the explorers wish to establish an exploration camp at the same place and drill or use earthmoving equipment in the near vicinity of it then it can readily be said that there is a real risk that the community and social activities would be directly interfered with. On the other hand, it is difficult to see how the establishment of such a camp would interfere with the native title party's ability to carry on the community activities associated with looking after country which have been identified and relied on by the native title party in a direct or proximate way.

[113] The native title party's case appears to come down to saying that the grant of the exploration licence itself will require it, according to its traditional laws and customs, to take action involving discussions, negotiations and attempting to reach agreement with the grantee party and that the carrying on of these activities is likely to be directly interfered with by the grant of the tenement and whatever exploration the grantee party is permitted to do.

[114] I can accept that the native title party's traditional law and customs require it to take this action and respond to the proposed grant but do not think that this means that the capacity to carry on these activities is hampered or adversely affected in a direct way. The activities associated with looking after country, as relied upon in this matter, can still be carried on. For example, the native title party's own contention is that the relevant community activities include reaching agreement with the grantee party 'if possible' and, if such an agreement is reached, to ensure compliance with it. There would be no direct interference with carrying on this activity by the native title party if the future act was done.

[115] The matter could also be looked at by considering whether a request to a native title party by another Aboriginal group to traverse their land or hunt or conduct ceremonies on it or have discussions and negotiations about marriage or burial rights would constitute a direct interference with the carrying on of the native title party's community or social activities. The Tribunal can accept that negotiations about these activities may occur but I do not consider that they could be seen as interfering with the carrying on of the community or social activities of the respective groups in normal circumstances and in the absence of any actions which caused serious conflict to arise between them. The community activity of looking after country can be conducted or carried on by native title holders in various contexts including but not limited to proposals to grant mining tenements.

[116] The grantee party's proposal likewise does not constitute interference with carrying on of the community or social activities relevant to this matter, particularly in a direct or substantial way, as is required according to French J in *Smith/FC* at [26]. The grantee party has indicated a preparedness to cooperate with the native title party, to have discussions about its exploration proposal and to sign a RSHA. There is no evidence that the past behaviour of the grantee party could cause the native title party or Tribunal to expect that the discussions and negotiations which are carried out will result in serious conflict or lead to other actions which would directly obstruct or hamper the native title party in the conduct of its responsibilities to look after country.

[117] An analogy may serve to illustrate the point. The United Nations Security Council has under the UN Charter certain responsibilities which it is required to perform. If there is conflict between two States which requires the intervention of the Security Council, it will need to have meetings and discussions and negotiations amongst its members and with the disputant states. The Security Council is required to perform (or carry on) with its functions

(activities) and deal with the dispute but the existence of the dispute itself and the fact that it may not be resolved does not constitute interference with 'the carrying on' of those functions in the ordinary meaning of those words.

[118] In summary, the situation is that the native title party has continuing responsibilities to look after country which I can infer also arise in contexts other than proposals to grant exploration licences. All these situations will involve the native title party dealing with the issues which arise by carrying on the social and community activities of looking after country relied on by the native title party in this case. The proposal to grant the exploration licence does not directly interfere with those activities but requires the native title party to continue to conduct the activities albeit in relation to a new issue.

[119] For the reasons given, my finding is that the carrying on of the community or social activities of looking after country as identified by the native title party are not likely to be interfered with directly by the grant of the proposed exploration licence. The native title party can continue to look after country as is required by their traditional laws and customs even though the circumstances now involve the grant of an exploration tenement. In the words of French J in *Smith/FC* (at [26]) the evidence does not demonstrate that the proposal to do the future act is likely to be the proximate cause of any apprehended interference being interference with the community or social activities of looking after country.

[120] The Government party has submitted that, if the native title party's contentions are accepted then a native title party would have a virtual veto over whether the expedited procedure would ever be attracted to exploration activity. I agree with this submission. The sort of community or social activities associated with looking after country identified by the native title party in this matter are, from the Tribunal's own knowledge, likely to be common to all native title holders. Contentions which are likely to have the result that the expedited procedure would almost never be attracted do not, in my view, accord with Parliament's intention in the 1998 amendments.

Other factors affecting community or social activities

[121] In *Smith/FC* the Federal Court also said that the Tribunal's evaluation of whether the relevant interference is likely is contextual (at [27]). The Tribunal has determined that the existence of mining or pastoral activities that did, or currently do, affect the native title holders' community or social activities may be taken into account when assessing whether

the grant of an exploration licence is not likely to directly affect those activities for the purposes of s 237(a) (*Walley* at [12]).

[122] In this matter, the evidence is that the proposed licence area is the subject of a pastoral lease and water and road reserves. Therefore, the carrying on of the community activities in question in this matter is subject to the lawful activities of the pastoralist on a daily basis. This means that there has been interference with the carrying on of those activities since the pastoral lease was granted. While there is no specific evidence as to the degree of such interference, the Tribunal is entitled as part of the overall context to have regard to the fact that the grant of a pastoral lease and pastoral activities will already to some extent have interfered with the native title party's obligations to look after country.

Sites of particular significance (s 237(b)) and major disturbance to land and waters (s 237(c))

[123] The focus of this inquiry has been on s 237(a) because the native title party made no contentions and produced no evidence relating to the issues dealt with in ss 237(b) and (c). In *Smith/FC*, French J found that:

> 'The Tribunal is ... required to assess whether, as a matter of fact, the proposed future act is likely to give rise to the interference or disturbance referred to in pars (a), (b) and (c) of s 237': at [23], emphasis added.

[124] I therefore accept the Government party's contention that I am required to inquire into the matters covered by ss 237(b) and (c) in order to determine whether or not this is an act attracting the expedited procedure. The only factual material available to the Tribunal on these topics is that provided by the Government party and the grantee party as set out above. Further, since the Objector has 'amended' its objection so that it no longer makes any reference to ss 237(b) and (c) and has not provided any evidence in relation to those provisions, it is not necessary for me to consider any contentions made in relation to those paragraphs by the native title party.

[125] On the basis of that evidentiary material before the Tribunal, I am satisfied that it is not likely that there will be interference or disturbance of the kind mentioned in ss 237(b) and (c).

Determination

[126] The determination of the Tribunal is that the grant of exploration licence E53/1406 to Bushwin Pty Ltd, is an act attracting the expedited procedure.

Hon C J Sumner
Deputy President
24 February 2011