Reported at (2002) 169 FLR 1

NATIONAL NATIVE TITLE TRIBUNAL

Moses Silver, Ishmael Andrews & Sammy Bulabul/Northern Territory/Ashton Exploration Australia Pty Ltd, [2002] NNTTA 18 (1 February 2002)

Application No: DO01/13

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

- and -

IN THE MATTER of a Future Act Determination Application

Moses Silver, Ishmael Andrews & Sammy Bulabul (Native Title Party)

- and -

Northern Territory of Australia (Government Party)

- and -

Ashton Exploration Australia Pty Ltd (Grantee Party)

INQUIRY INTO AN EXPEDITED PROCEDURE OBJECTION APPLICATION

Tribunal: **John Sosso**
Place: **Brisbane**
Date: **1 February 2002**

Hearing dates: 10, 22 October, 5, 13, 16, 30 November 2001

Government Party: Mr Daniel Lavery, Solicitor for the Northern Territory

Native Title Party: Mr Angus Frith of Counsel, instructed by Mr Mark Rumler of the Northern Land Council

Grantee Party: Mr Jeff Wilkie

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – protocols for guidance of parties – parties contentions - whether act directly interferes with community life – whether act interferes with areas and sites of particular significance

– major disturbance to land or waters - protection under existing legislation – risk of environmental or cultural disturbance remote – an act which attracts the expedited procedure.

Legislation: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 3, 64.
Mining Act (NT) ss 23, 24, 24A, 26, 28, 29, 29A, 166, 166A.
Native Title Act 1993 (Cth) ss 29, 32, 44H, 77, 109, 146, 237.
Northern Territory Aboriginal Sacred Sites Act (NT) ss 20, 22, 30, 32, 33, 34, 35, 37.
Pastoral Land Act (NT) s 38.

Cases: *Cheinmora v Striker Resources NL* (1996) 142 ALR 21
Dann v Western Australia (1997) 74 FCR 391
Hollow v State Planning Authority (1980) 45 LGRA 39
Jack Dann/Western Australia/GPA Distributors Pty Ltd WO95/19 (No 2) Hon C J Sumner, 10 June 1997
Little v Western Australia [2001] FCA 1706
Liverpool Borough Bank v Turner (1861) 30 LJ Ch 379
Mabo v Queensland (No 2) (1992) 175 CLR 1
Maureen Young/Western Australia/South Coast Metals Pty Ltd WO00/402 Member Sosso, 7 June 2001
National Council of Jewish Women v North York (1961) 30 DLR (2d) 402
North Ganalangja Aboriginal Corporation v Queensland (1996) 185 CLR 595
Paul Cox & Ors/Western Australia/Stirling Resources NL, WO97/97, 27 October 1997 Hon C J Sumner
Re Cheinmora (1996) 129 FLR 223
Re Irruntyju-Papulankutja Community (1995) 1 AILR 222
Re Nyungah (1996) 132 FLR 54
Re Waljen People (1995) 1 AILR 227
Risk v Native Title Tribunal [2000] FCA 1589
Shaw v Wolf (1998) 83 FCR 113
Smith v CRA Exploration Pty Ltd (1996) 133 FLR 251
Smith v Western Australia (2001) 108 FCR 442
Tilmouth v Northern Territory (2001) 109 FCR 240
Wandarang People v Northern Territory (2000) 104 FCR 380
Ward v Western Australia (1996) 69 FCR 208
Western Australia/Winnie McHenry WO98/125, 28 July 1999 Deputy President Franklyn
Western Australia v Smith (2000) 163 FLR 32
Western Australia v Thomas (1996) 133 FLR 124
Western Australia v Ward (1996) 70 FCR 265
Western Australia v Ward (2000) 99 FCR 317
Wik Peoples v Queensland (1996) 187 CLR 1

REASONS FOR DETERMINATION

Background

[1] On 13 December 2000 the Northern Territory ("the government party") issued a notice pursuant to section 29 of the *Native Title Act 1993* ("the Act") that it proposed, inter alia, to grant Exploration Licence 22339 ("the proposed tenement") to Ashton Exploration Australia Pty Limited ("the grantee party") and included a statement that it considered this act attracted the expedited procedure.

[2] The proposed tenement is situated wholly within two pastoral leasehold properties: Perpetual Pastoral Lease 1161 (commonly referred to as "Chatterhoochee) and Perpetual Pastoral Lease 1162 (commonly referred to as "Mount McMinn").

[3] On 13 March 2001 a native title determination application was filed with the Federal Court (D6019/01). The name of the application is "Chatterhoochee" and the applicants are Mr Ishmael Andrews, Mr Moses Silver and Mr Sammy Bulabul. The application was entered on the Register of Native Title Claims on 29 March 2001. The Chatterhoochee application covers the area of the proposed tenement.

[4] A Form 4 (Objection to Inclusion in an Expedited Procedure Application) was lodged with the Tribunal within four months (23 March 2001) after the section 29(4) notification day (13 December 2000) – section 32(3). The named objectors were the abovenamed applicants. I have previously determined that the Form 4 objection has been properly accepted by the Tribunal pursuant to section 77(2).

[5] On 1 October 2001 Deputy President Sumner, acting in his capacity as delegate of the President, directed that I constitute the Tribunal for the purpose of this expedited procedure inquiry.

[6] Prior to my appointment, Deputy President Sumner made Directions on 11 July 2001 dealing with the manner in which the expedited procedure inquiry would be conducted. Those directions have been subsequently followed by all parties to this inquiry. Further directions were issued by Member Sosso, and there have been a number of listings hearings during the course of this matter, mostly by teleconference, but including one in Darwin on 16 November 2001 where all parties appeared in person before the Tribunal.

[7] Apart from written material presented to the Tribunal, and the oral presentations of legal representatives of the government and native title parties, as well as the representative of the grantee party, it was also put to the Tribunal by the native title party that there should be a hearing of the matter on country, at Kewulyi Community at Roper River. The following reasons were adduced: (*Objectors Statement of Contentions* at para 31).

> *"a. Given that this is likely to be one of the earlier Objection matters in the Northern Territory, it is appropriate that there be an opportunity for oral submissions to be made to the NNTT about the legal effect of the statutory regime subsisting in the Northern Territory on the matters before it.*
>
> *b. It is appropriate that the NNTT Member making the decision in this matter, and other Objection matters in the future have had some direct exposure to:*
>
> *i. The community where some of the native title claim group live;*
>
> *ii. The community or social activities carried on by those people at the community and in the licence area;*
>
> *iii. Direct expressions of people's concern about the impact of exploration activities on those activities, areas and sites of particular significance, and about disturbance to land or waters;*
>
> *iv. The licence area subject to the act.*
>
> *c. The location of the community and the licence area is readily accessible by air and by road."*

[8] Neither the government or grantee parties objected to an on country hearing. While section 151 of the Act enables the Tribunal to make a determination "on the papers", nevertheless the Tribunal must hold a hearing if it appears to the Tribunal that the issues for determination cannot be adequately determined in the absence of the parties. In this instance, the fact that there was unanimity amongst the parties of an "on country" hearing persuaded the Tribunal to agree to this course of action. Accordingly an on country hearing was held at Kewulyi Community on 13 November 2001.

[9] The Tribunal was informed by the native title party that the following persons may be giving evidence on country: Mr Sammy Bulabul, Mr Moses Silver, Mr Peter Woods, Mr Daylight Ngaiyunggu, Mrs Eileen Daylight, Mrs Mildred Ponto and Mrs Margaret George. In accordance with procedures agreed to, each of the previously mentioned persons were administered an oath. In addition it was agreed that there would a person giving primary evidence (in this instance Mr Bulabul) and that other persons who had taken either an oath or affirmation could interpose themselves during the course of the primary evidence provided that they identified themselves before proceeding. As it transpired, evidence was given in a fairly structured manner without the sort of flexibility that was originally envisaged.

During the course of the hearing a further witness was sworn, Mr Barney Illaga. An issue arose as to the status of Mr Illaga to give evidence on sites which may be of particular significance which is dealt with later in this determination.

[10] Section 109(1) provides that the Tribunal must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way. Subsection 2 requires the Tribunal to take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to a proceeding. Finally, subsection 3 ensures that in carrying out its functions, the Tribunal is not bound by technicalities, legal forms or rules of evidence.

[11] It was clear at the beginning of the testimony of Mr Bulabul that he was not comfortable giving evidence. This situation improved considerably during the course of his testimony. As mentioned, the Tribunal is not bound by rules of evidence. Counsel need to be given latitude, at least at the outset, to ensure that indigenous witnesses who may not be used to Tribunal proceedings, are properly able to give their evidence. This may require in some circumstances the Tribunal allowing counsel representing native title witnesses to adopt techniques that ensure that the Tribunal is provided with the testimony it is convened to hear. Obviously if a representative was totally leading a witness or putting words into their mouth this would be unacceptable and reflect poorly on the evidence given. A common sense approach is required and it was pleasing that during the on country hearing at Kewulyi the legal representatives of both the government and native title parties co-operated to ensure that proceedings were conducted in a relatively informal, but effective, manner.

[12] Prior to the on country hearing I issued protocols for the guidance of the parties. Those protocols are set out below:

1. Should there be any welcome, the Member will respond. Other parties are at liberty to also respond.
2. Hearings will commence with a brief introductory statement by the Member, with parties at liberty to raise any preliminary points of law or procedure.
3. Hearings will be in public. If, during the course of the hearing, either on its own initiative, or on the application of a party, the Tribunal may direct that a part of the hearing be held in private.
4. The hearing will be recorded. Transcription of the recording will be determined after the hearing, however, if a party wishes to obtain a transcribed copy that issue should be raised at the hearing.

5. If any part of the hearing is held in private, the Tribunal will determine whether to cease recording after hearing the submissions of the parties.
6. Any person wishing to give evidence must take an oath or affirmation.
7. Cross-examination and re-examination will only be by leave of the Tribunal.
8. If part of a hearing is held in private the Member will give directions, after hearing from the parties, on those persons who may be present. In reaching a determination the Member will have due regard to the customary concerns of Aboriginal People.
9. Evidence given or obtained in a private hearing will be subject to such confidentiality orders as are appropriate, after hearing submissions of the parties.
10. As a matter of procedural fairness, when evidence is heard in private those persons present will be:
    - Persons authorised to hear the evidence according to their traditions;
    - Counsel;
    - Tribunal case manager – unless an objection is raised;
    - A legally unrepresented party;
    - Such other persons as are agreed by the native title party.
11. Hearings will be conducted in an informal manner.
12. Counsel and parties are not required to abide by any particular dress requirements.
13. Grouped evidence will be permitted, provided all persons wishing to address the Tribunal have taken an oath or affirmation, and seek permission of the Tribunal before speaking.

[13] Apart from the evidence received "on country" all parties have submitted to the Tribunal extensive written contentions, which are as follows:

Government Party Contentions

Statement of Contentions of Government Party *("GPSC")* dated 19-9-2001;
Contentions in Reply (*"GPCR")* dated 17-10-2001;
Final Contentions of Government Party *("GPFC")* dated 5-12-2001; and
Contentions in Relation to Expert Evidence *("GPEE")* dated 24-12-2001.

Native Title Party Contentions

Statement of Contentions of Objectors *("OSC")* dated 3-10-2001;

Objectors' Reply to the Contentions of the Government Party *("OCR")* dated 17-10-2001;

Contentions of Objectors Hearing on Country *("OHC")* dated 19-10-2001;

Response to Tribunal Matters (*"ORTM")* dated 5-12-2001;

Contentions Arising out of Hearing On Country (*"OCHC")* dated 7-12-2001; and

Reply to Final Contentions of Government Party *("ORFC")* dated 13-12-2001

Objectors Reply to Contentions in Relation to Expert Evidence *("ORCEE")* dated 18-01-2002

Grantee Party Contentions

Statement of Contentions *("GrSC")* dated 9-10-2001; and

Final Statement of Contentions of Grantee Party (*"GrFC")* dated 3-12-2001.

I will refer to pertinent parts of those contentions later. In addition the native title party submitted on 4 October 2001 a witness statement of Mr Sammy Bulabul. This statement is set out in full below:

"1. The area of the Chattrerhoochie native title application includes the area of ELA 22339.

2. *I am Mingirringgi for Kewulyi. Rex Wilfred and Nipper Wilfred are Junggayi. I live at Kewulyi, in the Roper Valley. The community sits on top of a very important sacred place. It goes from the community to the other side of the road to the east, about 100 metres. It is on Kewulyi Land Trust.*

3. *Over to the east, where the ELA is, is called Namal Namal. Namal Namal is Kirrimpu country, big red kangaroo. That's him over there in the hills east of Kewulyi. If they do drilling, digging in there, it will affect that kangaroo. He jumped from hill to hill: from the hills 5 or 6 kilometres from Kewulyi (on the Kewulyi side of the old homestead) to the white hill about 400 metres south south east of Kewulyi, to the hill south of Kewulyi, to the spring at Kewulyi, with the King Brown. Kangaroo, he went underground at that spring, come out at Balabalamani, near the Roper Highway; first creek where you come from the highway. The water goes underground. That Balabalamani is inside my block, and all those Kirrimpu hills around. There are secret places where that kangaroo hopped, all on my block. They're not allowed to bulldoze the hills on my block.*

4. *White people have to talk first to us. Moses Silver is my main Junggayi for this Kirrimpu country. I can tell you about it, but you got to ask Moses. If I go tell white people first, I get in trouble from the Junggayi. We all got to decide it together Aboriginal way. They should not go in the kangaroo area. They have to be careful.*

5. *Ben Tapp damaged the site at Kewulyi with a bulldozer. I took him to court. Ben would have made trouble for me, blackfella way. Any damage to this area, any tree, I would have been killed, and all my kids. I got to pay through Junggayi. If one of the hills is damaged, kangaroo, it's the same story; finished. I was very worried by what Ben did.*

6. *Bandiyan is a King Brown Ceremony. He goes from Walanji to Jawolara, over to Kewulyi. He crawls around Kewulyi and goes down there at the spring forever. Me and my kids, Farrells, Victor Sandy and all his kids; all Bandiyan.*

7. *Blackwater Creek is a sacred area too. The creek goes through the range on both sides.*

8. *Rrewin is at Blackwater Yard, but further up. It is a long way east, close up to the old boundary line for Roper Valley. They've still got to go through Junggayi. Victor Sandy is the boss for that area.*

9. *Jawolara is all a sacred area. All along the Hodgson River is a sacred area. Blackwater Hill is an important hill. Ceremony starts from Walangi at Roper Bar and comes back this way: Mermaid, Mungamunga. It goes south, follows the Hodgson River.*

10. *Garnji is red leg, that Jabiru. He is a hill on the right hand going down to Hodgson. On top of that hill is an important place. That bird landed and took off. The company can do work all around, but not right*

on top. We have a tank and a bore on the side. I am not the boss for it. You have to get August or Daylight.

11. *Amakamawarra is still inside Namal Namal, inside my paddock. It is back behind, sunset side of the road, just between the road and the hill. It is all mixed up; the emu and the whirlwind both go over there, Dua and Yirritja. If they want to drill there, they have to see August, Barney, or Daylight.*
12. *The Tapps lock the gates to the Roper River. We can't go fishing there. We have to go out to the dry area including the ELA area. We shoot turkey and kangaroo. People go towards the hills and on the other side of the hills, on foot, every week, every month. They just go.*
13. *People get wood from the ELA area to light fires for tea, damper and kangaroo. People get bush medicine there, bush potatoes, wild honey, yams. It will be hard to live at Kewulyi if they are working just there.*
14. *There are a lot of paddocks on Namal Namal. It is good country for horse and cattle. The company should not damage it. They got to look after the fences and paddocks. We have got private horse and cattle coming on soon. The ILC is working with me on it. There will be a lease from Kewulyi Corporation.*
15. *If the company goes drilling, bulldozing, all the country will be different. Drilling can be a long way down. That bulldozer might dig a big hole.*
16. *If they find anything, there will be a mess later on, and mess for the people with cattle in there. Looking around is OK. Taking and testing things will make a big mess. I am worried about that. I don't want a big mob of damage. The company will have to make it really good.*
17. *There'll be poison maybe. It might drip away to the river and go down to Groote Eylandt. There'll have to be a big dam for poison stuff if that thing breaks out and poisons everything, like at Borroloola. If that dam breaks, all that poison will come out and kill all the fish and turtles in the river."*

[14] The native title party also relied on the findings of Aboriginal Land Commissioner, Justice Olney, in the *Roper Valley (Kewulyi) Land Claim No. 163* (Report No. 56). The native title party submitted extracts from that Report and contended that the Tribunal should adopt the findings of the Commissioner, relying on section 146(b) of the Act. The government party said that the correlation between the traditional owners identified in the Report and the native title claim group is unknown, and even if there was a correlation, the extracts were of little, if any, relevance to the inquiry (*GPCR* at para 7(a)). The native title party outlined a number of reasons why the Tribunal should adopt Report No 56, and while some of the reasons advanced were of assistance many of the others (e.g. the history of successful ALRA applications etc) were not of relevance to this inquiry (*OSC* at para 31).

[15] One matter of concern was the submission of only short extracts from the Report of Justice Olney. It clearly is not satisfactory to provide the Tribunal with 10 pages from a report of 42 pages and then submit that the Tribunal accept the Report with the other 32 pages sight unseen. As it is, I have read the whole Report of Mr Justice Olney, and only on that basis has the Tribunal been prepared to proceed. Clearly if parties wish the Tribunal to exercise its powers under section 146(b) and adopt the report or the findings in the report of a Commissioner, then the party making this submission should provide the Tribunal with a copy of the full Report being relied upon. Selective

quotation of random passages is not helpful, and in some cases could present a misleading impression.

[16] The Report of Justice Olney is of assistance in this inquiry. The area under claim (144 square kilometres), was known as the Roper Valley homestead block or the Kewulyi block which included the Old Roper Valley homestead, and borders in the east the Chatterhoochee pastoral lease. The Aboriginals on whose behalf the claim was made included Moses Silver and Sammy Bulabul, who are two of the three objectors in this matter. Persons who gave evidence before Mr Justice Olney included Mrs Eileen Daylight, Mrs Margaret George, Mr Sammy Bulabul and Mr Moses Silver. Each of these persons was sworn as witnesses during the on country hearing at Kewulyi. In addition Justice Olney outlined at length issues relating to the dreamings and spirituality and traditional aboriginal ownership in the Roper Valley region. While His Honour's findings were directed towards matters under a different statute, they are also of interest to this inquiry. Moreover, no one has seriously challenged the findings of Mr Justice Olney in this regard. While the correlation between the claimants in the matter before Justice Olney and the native title party in this case is not beyond doubt, it is clear that the generic issues of Aboriginal laws and customs in this region of the Northern Territory is of direct relevance.

[17] Justice Olney sets out (paras 23-30) key information about the Roper Valley region, including the Aboriginal presence at the Roper Valley station, the attempts to protect the Kewulyi site and a 1994 incident when a pastoralist was convicted of breaching the *Northern Territory Aboriginal Sacred Sites Act* for having caused unauthorised bulldozer work to be carried out (an incident which figured prominently in the on country evidence).

[18] His Honour discussed at length the spiritual basis of the Aboriginal relationship to land in this region (paras 31-33):

> *"31. ... While there are clearly distinguishing features to the culture and social organisation of the Roper Valley Aboriginal people, much is shared in common with others over a much wider area, especially the spiritual underpinning of the land tenure system.*
>
> *The countryside and all on and in it are the result of the activity of certain powerful ancestral beings. These are now generally known to Europeans as Dreamings and the era of creation, the Dreamtime. Although the entire universe is said to have been created by them5 (sic) myth and song are usually restricted to specific features of the landscape which they both created and visited. Many of these Dreamings created these by emerging from the earth (or the sea). Following this the beings travelled across the country visiting/creating many other places. The beings continued in this manner until, deciding to journey no further, a final site was created where they re-entered the earth, or sea, or sky. The resultant "string" of sites constitute what is often described to Europeans as a "Dreaming[s] Track".*
> *Not all Dreamings, however, had long journeys. Some stayed within a short distance of the site from where they emerged. There are, therefore, both "local" and "travelling" Dreamings. The latter can be very significant across a wide area. In considering a limited area, however, the local Dreamings can often be paramount. A combination of both are found within the claim area.*

The Dreamings created more than landforms, they also created the various natural species (plants and animals), people and social organisation. As a result of their activity and creativity many places remained charged with their power. These are often called "sacred sites" to Europeans and are important, often dangerous places. The site Kewulyi is one.

32. *According to Aboriginal tradition, the claim area is the creation of several ancestors, most notably a 'hill kangaroo' Dreaming (Kirrimpu) and a snake woman Dreaming for the homestead area and the plateau rising behind it. A small species of dark and light coloured duck Dreaming is associated with the central and western portions of the claim area. A whirlwind Dreaming influences the south-eastern and southern margins. The Balginy, Yabaduruwa and Kunapipi ceremonies are inextricably linked to these two areas and their Dreamings.*

33. *The principal character of Kewulyi mythology is described as a big old man hill kangaroo (euro), Kirrimpu. He travelled from the Doomadgee area of Queensland to the southern edge of the original Roper Valley pastoral lease in the vicinity of Natakarina, a site on the Hodgkin River just north of the boundary between the former Roper Valley and Hodgkin Downs pastoral leases. From there he continued almost due west towards the hills between the Hodgkin River and the old Roper Valley homestead. A waterhole in this area is known as Winiwini. A depression on the plain and low hills east from the homestead mark the approach to the Kewulyi site. In the immediate vicinity of the homestead there are a number of associated features, notably a ridge, the waterhole itself and a flat rock not far from the waterhole where Kirrimpu encountered Parntiyan (a snake woman of the king brown species) which is said to have originated in the area. Upstream from Kewulyi waterhole is a rock hole and a waterfall known as Yarrangka, a site of snake Dreamings. From Kewulyi, Kirrimpu travelled north to or near another rock hole, Bululungin. Further north still the Dreaming track passes through a small gap on the eastern side of Black Jack Hill or Marrabanyan. Another creek located in this area is named Balubalumani after a rockhole located at its source. Balubalumani is a euro Dreaming site. After leaving the high hills north of the homestead the Dreaming came onto the plain approaching the Rover River where there are numerous waterholes situated for the most part within the Urapunga Stock Route waterholes. The euro travelled to one such waterhole Holloway (Wolowoy) and then a short distance westward to other isolated waterholes, including the sites Bargbargmayn and Balmurigun before heading directly to the Roper River. In the same vicinity there is a long winding water hole known as Kujawalin where Kirrimpu finished his long journey by jumping into the lagoon; his body transformed into a rock which is only visible during the dry season, when the water level is low. Parntiyan (snake woman) and Kirrimpu (euro) are the central characters in the Balginy ceremony performed on the claim area. It is the activity of Parntiyan and Kirrimpu on the eastern part of Roper Valley station which is celebrated by the Balginy."*

[19] It was pointed out that there were two separate groups of Aboriginal people involved in the claim, one being the Kewulyi or Roper Valley group. The other group was the Gunduburun or Mole Hill group. However, the country of each of these groups extended far beyond the area of the ALRA claim (para 38), and importantly, His Honour indicated that it extended beyond the eastern boundary of the ALRA claim (at para 56) which would mean that it would go into the Chatterhoochee pastoral holding. The evidence disclosed local descent groups comprised of persons claiming country through their father's father, mother's father, father's mother and mother's mother. Within each of these groups claimants are categorised as mingirringgi, junggayi or dalnyin. The evidence disclosed that each category of person had different but complementary rights in land and ceremony. The mingirringgi perform as actors in their land's ritual, the songs etc associated with particular land belong to its mingirringgi. The junggayi do the work required to hold the ceremony and uphold the law and punish and fine mingirringgi for breaches of the "law". Importantly, they ensure that sacred sites are not damaged and restricted areas are not entered. The dalnyin, inter alia, assist in site

protection and inform the junggayi of any damage (see para 39). The following observations of Mr Justice Olney are also of relevance (at paras 53-55):

> *"53. There are a number of sites both on and close to the claim area which are associated with either or both of the Kirrimpu (hill kangaroo) and the Parntiyan (king brown snake) dreamings. The evidence of the Kewulyi group witnesses confirms that each category of claimant, namely mingirringgi, junggayi and dalnyin, shares the same spiritual affiliations with the sites associated with the relevant dreaming. It follows that members of the Kewulyi claimant group have common spiritual affiliations with sites on the land.*
>
> *54. The Kewulyi group as a whole exercises spiritual responsibility for sites on the claim area associated with the Kirrimpu and Parntiyan Dreamings. That responsibility is demonstrated in a number of ways including such activities as:*
>
> > *the performance of, and involvement in, traditional ceremonies;*
> >
> > *the transmission of knowledge about the ceremonies, the Dreamings and*
> >
> > *the country generally to younger members of the group;*
> >
> > *the protection of sites, and particularly the important Kewulyi site, against unauthorised intrusion and damage; and*
> >
> > *living on or in close proximity to Kewulyi country.*
>
> *The spiritual responsibility for sites on the claim area and for the land which is exercised by the Kewulyi claimants is derived by descent from earlier generations who have exercised a similar responsibility in respect of the same sites and the same land and that responsibility is peculiarly the right and function of members of the local descent group. The Kewulyi local descent group is by reason of the common spiritual affiliations of its members placed under a primary spiritual responsibility for their traditional country and particularly for the Kirrimpu and Parntiyan sites on the claim area.*
>
> *55. Members of the Kewulyi group asserted in evidence the right in accordance with Aboriginal tradition, of members of the group to hunt and forage over Kewulyi country. There is no reason to doubt the validity of such a claim which was not challenged and which is entirely consistent with well known Aboriginal traditional rights throughout the Northern Territory."*

General Legal Principles

[20] The key statutory provision in any expedited procedure inquiry is section 237 which is set out below:

> "*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;*
>
> *(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."*

Predictive Assessment

[21] Both the government and native title parties rightly contended that section 237 requires the Tribunal to make a predictive assessment about the likelihood of the act in question having any of the consequences outlined in paragraphs (a) – (c) set out above. The proper approach to the application of section 237 was explained by French J in *Smith v Western Australia* (2001) 108 FCR 442. His Honour pointed out (at 450): "*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.*" More recently this approach was also endorsed by R D Nicholson J in *Little v Western Australia* [2001] FCA 1706 at [69].

Standard of Proof

[22] The native title party contended (*OSC* at para 15) that the standard of proof is whether there is a real, or not remote chance or possibility of the matters under consideration occurring, regardless of whether that chance or possibility is less or more than 50 per cent. This assessment was not challenged by the government party and accurately sets out the law. Reference was made to the determination of Deputy President Franklyn in *Western Australia v Smith* (2000) 163 FLR 32. Deputy President Franklyn's approach was, in fact, upheld by French J in *Smith v Western Australia.* In that case French J made these observations (at 450):

> *"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. Such a judgment would potentially permit, without benefit of any negotiation, quite significant risks (of that interference or major disturbance) to be incurred. To put it crudely and quantitatively, on that construction a forty nine per cent chance of interference or major disturbance flowing from the act proposed would keep it within the realm of the expedited procedure. Consistently with the objects of the Act, the world '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 major disturbance of the kind contemplated by s 237."*

This approach was also endorsed by R D Nicholson J in *Little v Western Australia* [2001] FCA 1706 at [72].

[23] The government party contended (*GPSC* at para 12) that the Tribunal is required to apply a commonsense approach to the evidence adduced, but if facts are peculiarly within the knowledge of a party to an issue, and no evidence is adduced, then it is open to the Tribunal to form an adverse inference. This submission correctly sums up the legal position as explained by Carr J in *Ward v Western Australia* (1996) 69 FCR 208. His Honour made these observations (at 217):

"*In administrative matters such as these, any party (not just the native title party) has what might be termed an evidentiary choice. They might choose not to lead any evidence on a particular issue. But that does not necessarily mean that they must fail on that issue ie that they have an evidential onus of proof. The Tribunal might (subject to observing the requirements of procedural fairness) make its own inquiries and satisfy itself that the particular issue should be decided in favour of the party electing not to put evidence before it. Alternatively, part of an opposing party's evidence, whether in cross-examination or otherwise, may satisfy the Tribunal on the point. That party has, in colloquial terms, taken its chances and won. However … where facts are peculiarly within the knowledge of party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn when the administrative tribunal applies its commonsense approach to evidence. Again, if this happens, it will not be because of the application of any evidential onus of proof, but by the application of the commonsense approach to evidence."*

Presumption of regularity

[24]The government party also contended (*GPSC* at para 12) that there is a presumption of regularity; in summary that a grantee party will act lawfully in exercising rights given under an exploration licence. There are numerous determinations of the Tribunal to the effect that the presumption of regularity must prevail in the absence of evidence to the contrary – Deputy President Franklyn *Western Australia v Smith* (2000) 163 FLR 32 at 51-52. This approach was also accepted by Carr J in *Ward v Western Australia* (1996) 69 FCR 208 at 228 and 230. Having said that, it is only a presumption, and one that can be readily displaced should there be material before the Tribunal – see *Western Australia v Ward* (1996) 70 FCR 265 at 276 per Lee J.

Evidence of intention

[25] The native title party argued (*OSC* at paras 16-19) that the Tribunal should decide an objection on the basis that the grantee party will exercise all the rights available to it, even if the grantee party states that it is not its intention to do so. It was argued that the effect of exercising the rights granted under an exploration licence is to be determined by the terms of the licence and not the intentions of the parties. In support of its contentions, the native title party quoted this extract from Deputy President Franklyn's determination in *Western Australia v Smith* (at 51)*: "statements of present intention, no matter how genuine when made, do not necessarily reflect what, as exploration proceeds, will be the actual exercise of the rights created."* The government party did not specifically refute these contentions.

[26] I am unable to agree with the submissions of the native title party. There is no doubt that leading up to the 1998 amendments to the Act there was a consistent line of authority, both Tribunal and Federal Court, to the effect that, in other than exceptional cases, the intention and capacity of a grantee party were largely irrelevant. This view was first authoritatively expounded by Deputy President Seaman in *Re Irruntyju-Papulankutja Community* (1995) 1 AILR 222. It should be noted,

however, that even this line of authority did not rule out the use of evidence of grantee's intentions, rather it emphasised its limited value in other than exceptional circumstances.

[27] When the Federal Court rejected a predictive assessment approach in *Dann v Western Australia* (1997) 74 FCR 391 their Honours explicitly said that one reason for doing so was that otherwise regard must be had to the changing plans and intentions of the parties. Thus Wilcox J said in rejecting a predictive assessment approach (at 394):

> *"It would be incongruous to attribute to Parliament an intention that, in order to qualify for an expedited procedure in respect of an exploration licence, the proposed licensee has to develop a detailed plan of its proposed exploration operations and justify that plan, technically and financially at a public inquiry. On the 'predictive assessment' approach, the licensee must do this."*

Tamberlin J noted (at 400):

> *" The relevant future act in the present case is the "grant" of an exploration licence. It is not the actual extent of the work likely to be carried out which is relevant but rather the degree of disturbance authorised by the legal act of granting the licence. This involves consideration of the relevant terms and conditions of the licence itself and also the statutory rights and obligations which arise on the grant of such a licence."*

[28] Now, of course, since the 1998 amendments and the decision of French J in *Smith v Western Australia,* the Tribunal is required to adopt a predictive assessment approach. Logically there are two options available to the Tribunal. First, it could assume that the legal rights created by the grant of the tenement will be exercised to the fullest extent legally available to a grantee, and then determine on the evidence available, whether interference or disturbance is likely. The second approach is to consider the legal regime under which the grantee party will operate, and also, as an integral part of the predictive assessment, consider the likely exercise of the rights available, based on the evidence presented.

[29] At the outset, and with due respect to Wilcox J, I can see no requirement to assume that as part of a predictive assessment the Tribunal is obliged to undertake the type of inquiry he outlined, nor that a grantee party is obliged to provide evidence of the type he suggested. As His Honour said that "*would be a strange way of providing an expedited process"* (at 394). Rather, the Tribunal is obliged to approach the matters before it in a commonsense way. In addition, Deputy President Franklyn in *Western Australia v Smith*, while emphasising the limited use that could be made of evidence of grantee's intentions, went on to make this observation (at 51):

> *"However it cannot be fairly said, in my opinion, that evidence of intention can never be relevant to the predictive assessment. The fact that the Grantee in this case expresses his present intentions as to the exercise of the rights gives rise to the likelihood that those rights will be exercised as a minimum to the intended extent but dependant on the results of the progressive exploration steps. Further there may well be cases where the overall evidence gives rise to the likelihood that the expressed intentions will in fact be carried out. The degree of likelihood in each case will vary with the circumstances as will the weight to be*

given to the evidence of intention. It is probable that in many, if not most cases, the weight given will be negligible, if any is given at all. That however does not mean that evidence of intention should always be ignored. Logically it is relevant to likelihood. For those reasons I am of the view that evidence of the Grantee's intentions as to the exercise of the rights created by the grant is admissible but the weight (if any) to be given to that evidence will vary with the circumstances as the Tribunal finds them to be."

[30] The adoption of a predictive assessment necessarily allows the Tribunal to receive evidence of a grantee's intention where that evidence is adduced. In the absence of any evidence of intention, the Tribunal would be at liberty to assume that a grantee will fully exercise the rights conferred by the tenement. In short, a grantee is under no obligation to adduce evidence as to its intentions with respect to a tenement, but if the grantee does adduce evidence the Tribunal can consider the material it has before it. It would not be sensible to indicate what weight would be given to the material presented, as in all cases it will depend on a range of issues which will vary with each expedited procedure objection inquiry. Nevertheless, as Deputy President Franklyn, correctly highlights, evidence of intention cannot be unilaterally discarded in advance, as it is logically relevant to the question of likelihood.

[31] Professor Bartlett made these comments in his textbook *Native Title in Australia* (at p 384): "*It is suggested that the adoption of a predictive assessment requires regard to the intention of the grantee party. It is impossible to assess the likelihood of interference or major disturbance without such evidence. The definition of an 'act attracting the expedited procedure' contemplates regard to any indirect effect of the act, including the manner in which rights may be exercised. The intention of the grantee party would seem to be a prime consideration in determining the manner in which rights will be exercised."*

[32] Professor Bartlett has most probably over-stated the importance of this type of evidence, and the obligation placed on a grantee party, but nevertheless his analysis is basically correct. Finally it should be emphasised that even if no evidence is produced by a grantee party, or that evidence proves to be of little if any assistance to the Tribunal, and it is assumed that a grantee will fully exercise its legal entitlements, that does not necessarily result in a finding that there is likelihood of interference or major disturbance. Indeed the legal regime under which a grantee operates (and applying the presumption of regularity) may require the grantee to operate in a manner designed to minimise the risk or interference or major disturbance.

Activities outside the proposed tenement

[33] The native title party submitted that in considering whether the criteria in section 237 apply, it is appropriate to consider grantee party activities outside the licence area, and effects of grantee party activities which have an effect outside of the licence area (*OSC* at para 20). It was said that there is nothing in section 237 which limits the consideration of matters to activities either on the licence area or effects of activities within the licence area. The following contention was made:

> "*22. Exploration activities can have an impact on community or social activities, areas or sites of particular significance, or land or waters outside the licence area. The Mining Act itself contemplates Grantee Party activities outside a licence area, and, indeed, duties owed to third parties in respect of those activities:*
>
> *a. A mining tenement holder has no right to impound, disturb or molest any stock or other animals belonging to….the owner or occupier of the licence area or any land adjoining the licence area [s174G]. The provision amounts to a recognition that mining activities can have an impact outside the licence area. Similarly exploration activities can have an impact outside the licence area.*
>
> *b. The grantee party can construct a right of way from the nearest road to the licence area [s.179]."*

[34] In response the government party contended that it is not relevant to consider activities outside the licence area as section 237(a) is limited to "*in relation to the land or waters concerned*". Any activities not permitted by the grant would be prima facie unlawful. Moreover the government party pointed out that the native title party's submissions were in abstract without any factual basis. It was contended: "*the examples given are of little assistance to the Tribunal; for example one provision merely gives expression to the restriction on the explorer of assuming the usual landholder right of impounding stock which stray onto the licence area. It does not speak to any off-licence activities, upon which it would be prima facie unlawful for the grantee to engage"* (*GPCR* at para 4).

The government party subsequently submitted with respect to section 237(b) that any sites claimed to be of particular significance need be "in relation to the land or waters concerned", and this meant that it must be within the proposed tenement, or so close as to be directly and physically affected by exploration activities.

The government party conceded that the Tribunal had determined in *Re Smith* (1995) 128 FLR 300 that sites not actually on the area of the proposed tenement could be relevant in determining the issue of interference in section 237(b). However it then suggested that this was most probably incorrect and the Tribunal was referred to the wording of the section 29 notice, the boundary of both the proposed tenement and the native title determination application (which correspond) and extracts from the judgment of R D Nicholson J in *Dann v Western Australia* (1997) 74 FCR 391 (*GPFC* at para 36).

[35] The government party has itself conceded that the Tribunal can consider (in the context of section 237(b)) areas or sites outside the proposed tenement which are close and will be directly and physically affected (*GPFC* at para 36). Certainly the words "in relation to" do not have a limiting effect (see eg *Queensland Mines Ltd v Northern Land Council* (1990) 68 NTR 1). Moreover, the fact that native title holders bring forward evidence in relation to land or waters that is either not part of the proposed tenement or the claim area, does not render that material irrelevant. In this matter, for example, the fact that community or social activities in the nearby community of Kewulyi may be directly interfered with by the future act can be considered, even though the community of Kewulyi falls immediately outside the area of the proposed tenement and the native title claim.

In reaching its determination the Tribunal is not restricted to considering the activities of a grantee party within the area of the proposed tenement. However, 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 section 237. The Tribunal's inquiry is limited and precise; it is not the role of an expedited procedure inquiry to traverse issues that have no direct relevance to the task at hand. The government party correctly highlights the artificial nature of a debate such as this, when what is being put forward is a statement in the abstract, unconnected to factual examples. Certainly the statutory provisions highlighted by the native title party provide next to no assistance to the Tribunal in this regard. While it would be artificial to prevent the Tribunal from considering all material relevant to making an expedited procedure inquiry determination, the Tribunal would need to be satisfied of the relevance of those off-site activities or rights to the grant of the proposed tenement.

Beneficial and protective character of the Act

[36] The native title party contended that the Act is beneficial and protective in character. This is a proposition that has been accepted by in a number of Federal Court decisions and Tribunal determinations. Thus French J noted in *Smith v Western Australia* (at 450): "*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.*"

[37] However, the native title party then went on and made this submission: "*That character is not to be overridden by way of a balancing of interests of native title holders against those of other parties. Procedural and substantive rights and interests of native title parties must be afforded full protection, in order to give expression to the purposes of the legislation. Thus, the evidence before the NNTT is*

to be dealt with in a manner that accords and is consistent with the traditions, laws, customs and useages of the Objectors and with the native title claim group." (*OSC* at paras 11-12).

[38] In one sense this contention is correct. The task given to the Tribunal is to determine the likelihood of interference or major disturbance under the criteria outlined in section 237. It is not an inquiry about balancing rights in the abstract. It is also correct to highlight that the Act is to be interpreted in a beneficial manner, at least when that is properly open to a Court or Tribunal. However, beyond those propositions the Tribunal should go no further, at least when it is being suggested, whether directly or indirectly, that somehow determining that the expedited procedure is attracted goes against the structure and objects of the legislation. If the Tribunal was to approach an inquiry in that way, it would, in effect, being imposing an onus on the government and grantee parties which the Parliament has not approved. While the right to negotiate has been recognised by the High Court as a valuable right, and a mechanism for maintaining, as far as possible, the status quo until a native title determination is made, nevertheless the Parliament has specifically legislated for an exception to that right in certain circumstances. It is not permissible for this Tribunal to interpret the criteria in section 237 in an unduly restrictive manner, or to read into the Act presumptions not sanctioned by the Parliament or the Courts.

[39] The native title party outlined the registered native title rights and interests of the registered native title claimants. It was then contended that the exercise of those rights and interests means "*the members of the native title claim group carry on community or social activities, prevent interference with areas or sites of significance in accordance with their traditions, and prevent major disturbance to land or waters". (OSC* at para 24).

[40] This contention may well be correct as a matter of principle, however, it is a statement in the abstract not founded on evidence of the exercise of those rights and interests that have relevance to an expedited procedure inquiry. The issue before the Tribunal is to determine the likelihood of interference or major disturbance based on whether there is material before it of, on the one hand, community or social activities or sites of significance, and, on the other, the extent of the legal rights of the grantee party taken together with other material on how those rights may be exercised. Of itself, the fact that native title rights and interests are asserted, does not inevitably lead to a conclusion that an objection will be upheld. It will depend in any inquiry on the actual evidence before the Tribunal and not on legal contentions alone.

Co-existence of rights with pastoral leases

[41] The native title party also dealt with the issue of the co-existence of native title rights and interests with pastoral leases. As mentioned previously, the proposed tenement is located within pastoral lease land. Section 38(1) of the *Pastoral Land Act* (NT) provides that a pastoral lease is subject to a number of conditions and reservations. One of those conditions (s 38(1)(n)) is a "*reservation in favour of the Aboriginal inhabitants of the Territory"*. Subsections 2-6 explain this reservation:

> "*(2) In a pastoral lease, a reservation in favour of the Aboriginal inhabitants of the Territory shall be read as a reservation permitting those Aborigines-*
>
> *(a) who ordinarily reside on the leased land;*
>
> *(b) who ordinarily reside on an area of land that at any time after 1 January 1979 was within the boundaries of the land that then comprised the leased land and which area of land has since that date been excised from the leased land as a living area or part of a living area for those Aborigines; or*
>
> ***(c)*** *who, by Aboriginal tradition, are entitled to use or occupy the leased land,*
>
> *subject to subsection (3) –*
>
> *(d) to enter and be on the leased land;*
>
> ***(e)*** *notwithstanding any other law of the Territory, to take and use the water from the natural waters and springs on the leased land; and*
>
> ***(f)*** *subject to any other law in force in the Territory –*
>
> *(i) to take or kill for food or for ceremonial purposes animals ferae naturae; and*
>
> ***(ii)*** *to take for food or ceremonial purposes vegetable matter growing naturally,*
>
> *on the leased land,*
>
> *but not permitting –*
>
> *(g) the Aborigines referred to in paragraph (a) to erect or use a structure on the leased land that would serve as a permanent shelter for human occupation, other than at the place on the leased land where they ordinarily reside; or*
>
> ***(h)*** *the Aborigines referred to in paragraph (b) or (c) to erect or use such a structure on the leased land.*
>
> *(3) Subject to subsection (4), a reservation in a pastoral lease in favour of the Aboriginal inhabitants of the Territory does not apply to a part of the leased land within 2 kilometres of a homestead.*
>
> *(4) Where an Aborigine was, or a group of Aborigines were, at the commencement of the* Aboriginal Land Ordinance *1978, residing within 2 kilometres of a homestead and was or were entitled to use educational, medical or other facilities provided for his, her or their use within that area, the Aborigine or group of Aborigines may reside within 2 kilometres of the homestead and use the educational, medical and other facilities provided for him, her or them until the Aborigine or group of Aborigines ceases to reside permanently within 2 kilometres of the homestead or until adequate facilities of a similar nature are provided on another site, whether or not on the leased land, being a site suitable to the Aborigine or group of Aborigines.*
>
> ***(5)*** *Where a pastoral lease contains a reservation in favour of the Aboriginal inhabitants of the Territory, a person shall not, without just cause, interfere with the full and free exercise, by the persons thereby entitled, of the rights reserved to them.*
>
> *Penalty: $5,000.*
>
> *(6) For the purposes of subsection (5), "just cause" includes reasonable acts taken by or on behalf of a lessee or another person having an interest in the lease to ensure the proper management of the lease for the purposes for which it was granted.*

[42] A very useful summary of the historical background to reservations in pastoral leases can be found in the judgment of Olney J in *Wandarang People v Northern Territory* (2000) 104 FCR 380 at 426-428. Reference can also be made to the judgment of Beaumont and von Doussa JJ in *Western Australia v Ward* (2000) 99 FCR 317. In this case their Honours said (at 406-407):

> "*The express reservations in the Territory on the one hand demonstrate clearly and plainly that pastoral leases, notwithstanding the use of traditional common law language and concepts indicative of the grant of a lease entitling the lessee to exclusive possession, did not extinguish all native title by granting pastoral lessees possession that was exclusive of the interests of Aboriginal people. However, on the other hand, they operate to define the scope of the Aboriginal rights which were preserved. Insofar as the terms of the reservations did not include Aboriginal rights, those rights were susceptible to extinguishment, and were extinguished to the extent of inconsistency with rights granted under the pastoral lease … The inclusion of the reservations as substantive sections in the enabling legislation, and in the pastoral leases themselves, clearly and plainly indicated that both Aboriginal people and the pastoralists had some co-existing rights over the land. As has been said, under the common law, parties possessing co-existing rights are required to exercise them reasonably, having regard to the other co-existing interest."*

[43] Olney J make the point in *Wandarang* that, simply because the relevant Northern Territory legislation reserves certain rights in favour of Aboriginal people, the legislation does not of itself manifest an intention to extinguish the rights not specifically reserved. However he acknowledges that the granting of a pastoral lease, giving, as it inevitably does, the right to the pastoralist to enter onto the land, occupy and use it, necessarily extinguishes exclusive rights of occupancy, use and enjoyment by native title holders together with any incidents of those exclusive rights (at 427-428).

[44] The native title party contended that the above statutory reservation "*allows the exercise of native title rights and interests sufficient to allow the native title claim group to at least carry on community and social activities, and to prevent interference with areas or sites of significance" (OSC* at para 28). In response the government party argued: "*the existence of these asserted native title rights and interests is a question of fact for each determination and subject to the credible evidence produced. It would be inappropriate for the Tribunal to extrapolate from a proven determination of native title to a non-proven one in the manner invited."* (*GPCR* at para 6).

[45] Insofar as the native title party is simply highlighting the uncontested fact that native title rights can co-exist on pastoral leases in the Northern Territory with those of the relevant lessee, I can see no issue with what was put forward. Nevertheless whether in fact community and social activities are carried on, such that there is a likelihood of interference, is a matter which cannot be determined in the abstract, but rather on the basis of the material before the Tribunal. The Tribunal's role is not to pre-empt the Federal Court which alone determines the existence or otherwise of native title. It is not for the Tribunal to determine whether claimed native title rights and interests exist, and, if they do, their nature and extent. That, again, is the sole prerogative of the Federal Court. In an expedited

procedure objection inquiry, the Tribunal must deal with registered native title rights and interests. Once an application, pursuant to which those rights and interests, is registered, the Act "*preserves the status quo pending determination of an accepted application claiming native title in land subject to the procedures referred to. The mere acceptance of an application for determination of native title does not otherwise affect rights, powers or interests." North Ganalangja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 616 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ. Even though the Tribunal recognises registered rights and interests, that recognition does not resolve the issue of the likelihood of interference or major disturbance with the matters outlined in section 237. Consequently, setting out registered native title rights and interests simply addresses the threshold issue of the right to object, and does not of itself answer the subject of the Tribunal's inquiry which is determining the likely impact of activities on the matters enumerated in section 237.

Meaning of the term "act"

[46] One final threshold legal issue can also be dealt with, although not directly raised by any of the parties. This concerns what is meant by the term "act" in section 237. It has previously been argued that the act is only the grant of the proposed tenement, and not what the grantee party may actually do in exercising the rights given. Obviously if a narrow interpretation was upheld it would go a long way towards comprehensively undermining the thrust of the native title party's contentions. This issue was dealt with by a full panel of the Tribunal in *Western Australia v Thomas* (1996) 133 FLR 124 (Members Sumner, O'Neil and Neate). The Tribunal rejected a narrow interpretation, and made the following comments in relation to section 237 (at 153):

> "*we consider that the parliament contemplated that the factors in s237 be judged in the context of what the grantee party intends to do, or at least is enabled to do by the legislation and conditions in the licence. If Mr van Hattem's argument is correct, there is no work for s237(a), (b) and the first half of (c) to do because the grant is incapable of producing the interference and disturbance referred to therein."*

[47] The approach endorsed by the Tribunal allows a Member conducting an inquiry to properly assess the likely impact the grant of the tenement will have on community and social activities, sites of significance and major disturbance to land and waters. It also allows a Member conducting an inquiry to approach this task by comprehensively evaluating the material presented and not unduly restricting evidence which may have relevance to the issues at hand.

Section 237(a) - Interference with carrying on of community or social activities

Introduction

[48] The native title party contended that the grant of the proposed tenement would be likely to directly interfere with the carrying on of the community or social activities of the native title claim group, and argued as follows: (*OSC* at paras 34-37).

- Members of the native title claim group exercise their native title rights within and in the vicinity of the licence area;
- In exercising such rights and interests, the community or social activities on and around the licence area are likely to be interfered with;
- The act will interfere with claimants' physical ability to enjoy their native title rights – e.g. impede hunting, fishing, gathering or conduct of religious ceremonies;
- The exercise of exploration licence rights is likely to directly interfere with the spiritual aspects of carrying on of community or social activities of the native title claim group

Legal Issues

[49] Section 237(a) was considered by French J in *Smith v Western Australia* (2001) 108 FCR 442. 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 section 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*, section 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 paragraph (a) or could also include spiritual and like activities. This issue was resolved by Carr J, who determined in *Ward v Western Australia* (1996) 69 FCR 208 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 section 237(b) "covered the field" so far as spiritual issues was concerned, and that the interference referred in paragraph (a) went beyond areas or sites of particular significance and focussed 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 km 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 section 237(a) was changed by the Federal Parliament.

[51] Prior to the 1998 amendments section 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 section 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* gave this overview of the reasons for this proposed change:

> *"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 section 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 section 237(a). On 3 July 1998 the Prime Minister introduced amendments to the *Native Title Bill Amendment Bill 1997* into the House of Representatives. Amendment 42 introduced the current version of section 237(a) – *House of Representatives Parliamentary Debates*, 3 July 1998 at page 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 Hon. 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 section 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 paragraph (a).

[53] Since the 1998 amendments the Tribunal has on a number of occasions considered contentions to the effect that paragraph (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 Deputy President Franklyn in *Western Australia v Smith*. It should be noted that in reaching his conclusion that paragraph (a) was limited to physical interference, Deputy President Franklyn referred (at 45-46) to the Explanatory Memorandum circulated with the *Native Title Amendment Bill 1997*. As noted, the comments in that Explanatory Memorandum related to a proposed amendment to paragraph (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 Deputy President Franklyn. It should be noted that other commentators have indicated that while, in their opinion, the current wording of section 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 paragraph (a) to reflect the real intention of the Federal Parliament – *Liverpool Borough Bank v Turner* (1861) 30 LJ Ch 379.

[56] The first matter that is clear is that paragraph (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 paragraph (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 Deputy President Seaman *Re Nyungah People* (1996) 132 FLR 54 at 65. While the approach of Deputy President Seaman 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, 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 v North York* (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 Deputy President Sumner 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 pp 52-53.

Consequently when the term "community activities" is used in paragraph (a) it is not necessarily limited to the activities of a particular residential or localised community – see *Hollow v State Planning Authority* (1980) 45 LGRA 45 and *R v Liquor Commission of NT; Ex p 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 Edition) 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 paragraph (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 paragraph (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 paragraph (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 paragraph (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 paragraph (a) to inevitably exclude any form of spiritual dimension, it would be just as clearly wrong to read into the new section 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 evidence

[63] The written evidence presented to the Tribunal on the physical aspects of the carrying on of community or social activities included the fact that there is one community (Kewulyi – formerly known as Roper Valley) in the immediate vicinity of proposed tenement. The grantee party estimated *(GrFC* at paras2 and 3*)* that the nearest building within the Kewulyi Community is situated about 1.5 kilometres from the nearest point on the western boundary of the proposed tenement and 2.75 km from another section of the western boundary. Whilst there was some debate during the course of the inquiry about the exact distance between the Kewulyi Community and the western boundary of the proposed tenement, for the present purposes I accept the approximate distances submitted by the grantee party. The exact distance is not the key issue: it is the acceptance of the close proximity of the Community to the proposed tenement. It is also the case that a public access road (the Hodgson River road) lies between the Kewulyi Community and the western boundary of the proposed tenement. The road is not sealed and is intersected by watercourses. This community is within the Kewulyi Aboriginal Land Trust and, as the grantee party correctly pointed out, access to it is restricted pursuant the operation of the *Aboriginal Land Rights (Northern Territory) Act 1976.* The grant of the proposed tenement would not bestow on the grantee party a right of access to the community (*GrFC* at para 4).

[64] Other communities lie some distance away (e.g. Minyeri Community at Hodgson Downs which is 20-30 km south of the proposed tenement, and Bringung Community which is an unspecified distance).

Grantee Party Submissions

[65] The grantee party submitted that the grant of the tenement would not be likely to result in interference to the community or social activities of the native title party. The Tribunal was informed that the activities planned by the grantee party would be:

- confined to well spaced sampling and prospecting activities including aerial surveys;
- limited to the area of the proposed tenement;
- limited to the dry season and are periodic and short term;
- governed by strict legislative compliance, prior approval; and
- conducted under strict environmental guidelines.

The grantee party also claimed that it undertakes appropriate meetings with the local community and traditional owners to discuss planned activities and to clear proposed work areas (*GrSC* page 4).

The Tribunal was informed that the grantee's intention is to initially conduct a regional diamond sampling program, which involves the collection by hand of drainage samples from creek and river systems and laboratory analysis of the samples. Follow up work could include gravel sampling, and if further positive diamond indicators were found, a geophysical survey would be proposed. Finally there would be the possibility of drilling.

As was indicated, the potential impact of the grantee's activity could range from the minimal (from office geological studies and data reviews to light vehicle reconnaissance) through to the drilling of sub surface "targets". Exploration is characterised as an "interactive" process with each stage being reliant on the results from the previous work (*GrSC* at page 2).

Native Title Party Submissions

[66] The native title party's initial contentions were as follows:

- there are several communities (Kewulyi, Minyeri and Bringung) in the vicinity of the proposed tenement;

- there are several roads (the Roper Valley Highway, the Hodgson River Road and station tracks) inside and in the vicinity of the proposed tenement that are used by members of the claim group to access the communities, and other areas for carrying on community and social activities;
- there are several water bodies (the Roper River and tributaries of the Hodgson River including Blackwater Creek) and other areas of environmental significance in and around the proposed tenement which are used for fishing and drinking water, and may sustain and be part of areas and sites of significance;
- claimed community or social activities included:

    (a) foraging;
    (b) hunting, fishing, and gathering of bush tucker, with reliance being placed on paragraphs 12 and 13 of the Witness Statement of Sammy Bulabul (set out at [13]);
    (c) collection of wood for fires, and for ceremonial and other purposes – Sammy Bulabul at paragraph 13;
    (d) collection of bush medicines – Sammy Bulabul at paragraph 13;
    (e) teaching children about traditional laws and customs and the significance of sites;
    (f) religious activities;
    (g) quiet enjoyment – Sammy Bulabul at paragraph 13;
    (h) looking after improvements on a pastoral lease – Sammy Bulabul at paragraph 14;
    (i) looking after country by visiting and maintaining sites – Sammy Bulabul at paragraphs 3-5, 8, 10 and 11.

With respect to the spiritual aspects of community or social activities, the native title party contended that there was an active community life in relation to the land, and a spiritual connection to, and responsibility for the land. It was also contended that custodians would get into trouble if they did not look after the land properly and that the community would be worried or upset by unauthorised activities on the land, such that there will be fear of illness or death if it is interfered with (*OSC* at para 40).

[67] It should be noted that with respect to the matters outlined in paragraphs (a), (e), (f) and (i), reliance was placed on the findings of Mr Justice Olney in the *Roper Valley (Kewulyi) Land Claim No 163 Report.*

[68] The native title party suggested that the presence of exploration equipment and personnel would be likely to reduce the willingness and capacity of members of the native title party carrying on community or social activities, and in particular hunting and fishing. One example given was the reluctance to use guns if there was exploration activity occurring on hunting grounds in the proposed tenement (*OSC* at para 46). Other claimed likely interferences to community or social activities were as follows: (*OSC* at paras 46-50)

- exploration vehicles using roads and tracks thereby disturbing, degrading, blocking etc those roads and tracks, and generally increasing traffic thus impacting on the use of them by members of the native title party;
- construction of tracks, camps etc is likely to impact on the environment and therefore the ability of members of the claim group to use the area;
- associated environmental impacts on flora and fauna as a result of exploration activity will be likely to reduce the availability, and discourage the use, of fauna and flora for hunting, gathering and ceremonial activities;
- exploration activities, it was claimed, are likely to directly impact on the claimant's ability, confidence and desire to access and use the area of the proposed tenement in a safe and unhindered manner;
- the living conditions and general well being of residents of communities in the vicinity of the proposed tenement are likely to be directly interfered with;
- there is a real and not remote chance that the ability of those claimants with specific responsibility for looking after sites will be affected and interfered with; and
- traditional law and custom require consultation and permission before exploration proceeds. Failure to do so is a failure of respect and ignores the traditional life and activities of the native title party.

Government Party submissions

[69] The government party pointed out that there are no Aboriginal communities situated on the proposed tenement, with the nearest being approximately one kilometre distant.

[70] It was further contended that use of roads and tracks by the grantee party would have an insubstantial impact, bordering on the trivial. Trivial impacts, as was highlighted, are not within the scope of section 237. In addition, the government party rightly highlighted the requirement to take

into account constraints already imposed on community or social activities by third parties and external regulation. The government party contended *(GPCR* at para 13):

> "*It would be unreal to assume that the native title claim group members can attend to community or social activities on pastoral land in some sort of exclusive zone where impact from other lawful users is not tolerated. These other users need [to] accommodate the activities of the native title claim group members and it must be presumed that concurrent rights-holders will respect the co-existent rights of others in relation to the land."*

The Tribunal's attention was drawn to the relative dearth of any material produced to support the native title party's contentions. It was argued that there was little or no evidence about the frequency of hunting, fishing and foraging. Moreover, there was no material to establish how, when, where and why a substantial impact on community or social activities would be likely to occur by the granting of the proposed tenement. Finally, with respect to the native title party's contention about the requirement of traditional law and custom that native title holders be consulted, the government party argued that this amounted to a right of veto, and was not supported by evidence, fell outside paragraph 237(a) and was addressed by the Second Schedule Conditions.

In conclusion the government party drew the Tribunal's attention to the contextual risk evaluation and said (*GPCR* at para 19):

> *"The evaluation by the Tribunal needs to include the following factors: the regulatory scheme which governs the exercise of rights under the grant of the proposed licence (presuming regularity); the lawful activities of third parties (most importantly, the pastoral lessee) conducted on, or in the vicinity of the land, which may impact on the carrying on of the community or social activities asserted, prior mining and/or exploration grants and pastoral leases over the same licence area and restrictions imposed by the general law upon the manner of engaging in activities on the land (eg restricted use of firearms, explosives and fire etc)."*

[71] The government party drew the Tribunal's attention to a number of relevant statutory provisions. Importantly section 24(j) of the *Mining Act* provides that every exploration licence (other than in specified circumstances) shall be granted subject to a condition that the licensee:

> "*conduct his exploration programmes and other activities in such a way as not to interfere with existing roads, railways, telephone or telegraph lines, power lines and cables, water pipelines or dams or reservoirs or gas, oil, slurry or tailings pipelines or storage containers, situated on the licence area, or the lawful activities or rights of any person on or in relation to land adjacent to the licence area."*

Applying the presumption of regularity, the requirement that a licensee not interfere with the lawful activities or rights of any person on or in relation to land adjacent to the licence area (which would include the Kewulyi Community) is an important issue in assessing the likelihood of interference pursuant to section 237(a). Also of relevance in this regard is the operation of section 171. This section allows the relevant Minister to cancel an exploration licence if the holder of such a licence has contravened or not complied with a condition (such as section 24(j)).

Conclusion

[72] The evidence initially provided to the Tribunal regarding community or social activities was very sparse. It was, in effect, limited to the Witness Statement of Mr Bulabul. The original contentions of the government party in this regard (which were set out in paragraphs 9-19 of the *GPCR)* were weighty. This is, despite the fact, that the Tribunal does not concur with the suggestion that section 237(a) is limited to the physical aspects of carrying on community or social activities. The evidence adduced by the native title party, at this stage, lacked the particularity necessary for the Tribunal to determine that there was a real risk of interference.

[73] The evidence provided "on country" in this regard did not add substantially to that which was initially produced. The native title party quite correctly pointed out that Mr Bulabul told the Tribunal that he, his five daughters, son-in-law and children live at Kewulyi (*Transcript of On Country Hearing at Kewulyi* at p 35). Mr Bulabul indicated that there were no other old people living at Kewulyi other than himself (p 35).

[74] Mr Bulabul also informed the Tribunal that people residing or staying at Kewulyi go onto the area of the proposed tenement (referred to as Namal Namal. The native title party explained Namal Namal in these terms: "*A name in English for it is Limestone. It is the name for a Kirrimpu site at the homestead on the block which is now called Namal Namal, but which formerly was called Chatterhoochie (Northern Territory portion 4970. The site is flat country with red soil and black soil." (OCHC* at para 22) during the wet season to get bush tucker. He mentioned wild bananas and black plum (p 37). Mr Bulabul also indicated that people went onto Namal Namal to collect wood for fires, and that this was done by walking from Kewulyi as distinct from using vehicles (pp 38-39).

[75] Kewulyi Community is also a centre for ceremonies during the dry season involving Aboriginal People from Ngukurr, Duck Creek and other mentioned locations (p 40). He mentioned that women and children came during this time and that they camped in the cooking area at Kewulyi referred to as "darlwani" (p 40).

[76] The native title party referred to this evidence *(OCHC* at paras 19-20), but added no further evidence or submissions.

[77] The government party highlighted the fact that Mr Bulabul during his evidence informed the Tribunal that the women no longer go onto Namal Namal to pick up lily roots, even though they once

did – "*not for a long, long time*" (pp 35-36). Moreover, only Mr Bulabul visits Namal Namal. When asked by Mr Frith what did he do on Namal Namal, Mr Bulabul's response was "*I just go out and visit the people who are staying there*" (p 36). Mr Bulabul did refer to fishing which occurs at the Roper River (p 36), but as the government party highlights the Roper River does not flow through the area of the proposed tenement, and, at its nearest point, is 2 km away (*OSC* at para 43a).

[78] In addition the government party suggested that as wood collection is by foot and not vehicle, it was not clear whether the native title party ever entered onto the proposed tenement to collect it. Certainly Mr Bulabul indicated in this testimony that people did not travel "*too far*" from Kewulyi when collecting firewood (p 38). However, for the purposes of this inquiry I am prepared to infer that the collection of firewood does take place within the area of the proposed tenement, albeit most probably localised to areas in the vicinity of the Kewulyi Community.

[79] The government party points out that a large range of community or social activities are said to occur over some or all of the proposed tenement, including foraging, hunting, fishing, gathering of bush tucker and medicines, teaching of traditional laws etc. Yet, there is "*scant particular material, if any, to prove any of these activities occur on the proposed licence area" (GPFC* at para 30). The Tribunal concurs with this assessment. While reliance can be made, for example, on the findings of Mr Justice Olney with respect to foraging, there would need to be some material before the Tribunal about foraging on the area of the proposed tenement, or if not on the proposed tenement, how the proposed activity on the tenement would be likely to interfere with foraging off site. There is insufficient material before the Tribunal on a predictive risk assessment approach to find that community or social activities will be interfered with.

[80] While Mr Bulabul in his witness statement made reference to wood collection, and the collection of bush food and medicine from the area of the proposed tenement, there was no evidence of frequency, or location, or the number of native title holders participating in this activity. Indeed Mr Bulabul's oral testimony went in the opposite direction. While indicating that there are community or social activities on the proposed tenement, it was clear that the frequency and nature of those activities are such that, the type of exploration activity outlined would be unlikely to materially interfere with them.

[81] As previously highlighted, French J pointed out in *Smith v Western Australia* (2001) 108 FCR 442 that interference has to be substantial: trivial impacts are not sufficient. The fact that there is an intersection between the community or social activities of native title holders, and the activities of a grantee does not determine the issue pursuant to section 237(a). It is the nature of that intersection

that is the issue. The Tribunal's task is to determine, on the basis of the material before it, whether the grant of the proposed tenement is likely to result in a direct interference with community or social activities of the type explained by French J.

[82] In this inquiry I am prepared to find that there is a likelihood that there will be an intersection between the community and social activities of the native title holders and the granting of the proposed tenement. I am not satisfied, however, that, having regard to the large area of the proposed tenement, the nature of the exploration activities indicated, the legal regime in place, and the evidence of the level and nature of community and social activities, that there would be a likelihood of any direct, that is significant interference. The evidence discloses that if there is any interference it will be minimal and contained in both geographical and time dimensions.

[83] I indicated to the parties that I was concerned that the Kewulyi Community is located so close to the proposed tenement and that access to it is limited to an unsealed road which is rough and subject to flooding. However, I received no further submissions from the native title party on this point, and having regard to the evidence submitted, I am not in a position to determine that the grant of the tenement is likely to directly interfere with community or social activities.

[84] Likewise, despite initial lengthy submissions about the spiritual dimensions of section 237(a), the native title party submitted no further contentions based on the evidence obtained during the on country hearings. In fact the native title party restricted its submissions to the matters highlighted above. In these circumstances, I am unable to find that if there be a spiritual dimension to community or social activities engaged in by native title holders that the granting of the proposed tenement is likely to result in direct interference with them.

[85] In conclusion, the Tribunal has been presented with substantial and weighty legal submissions from the native title party on section 237(a), but this impressive superstructure of legal contentions is not supported by sufficient evidence. Certainly I have formed the opinion that the granting of the proposed tenement will have some effect on the community and social activities of the native title party. However the material does not disclose that there is a real chance or risk that the community or social activities of the native title party will be directly interfered with in other than a minor, localised and non-substantial manner. The likely interference is not of a type that would allow the Tribunal to determine that the test of direct interference explained by French J in *Smith v Western Australia* had been established.

Section 237(b) – Sites of particular significance

General Legal Principles

[86] The government party contended that the *degree* of interference required by paragraph (b) was the same as that found by French J with respect to paragraph (a), namely having a significant (and presumably not a trivial) impact on an area or site of particular significance (*GPSC* at para 39). The native title party contended that the observations of French J were limited to paragraph (a), and that there was no basis for a contention that exploration activity had to have a substantial impact in the context of this paragraph. It was pointed out that impacts on a sacred site that are far less than constituting a substantial impact, are offences under the *Northern Territory Aboriginal Sacred Sites Act* (*OCR* at paras 26-27).

[87] It would not be correct to assume that the nature and level of interference in paragraph (b) is equivalent to the direct interference in paragraph (a). The interference in paragraph (a) is directed towards human activities. Obviously social or community activities could manifest themselves in a plethora of ways; and many of those activities could be purely functional with no symbolic significance in themselves. While I have found that the activities in paragraph (a) may well encompass a spiritual dimension, many of those activities would not; being purely utilitarian. In these circumstances if direct interference is suggested, the Federal Court has found that the interference must be substantial and not trivial. This has to be compared with the object of the interference in paragraph (b).

[88] Section 237(b) focuses the Tribunal's inquiry towards areas or sites of *particular* significance. As Carr J pointed out in *Cheinmora v Striker Resources NL* (1996) 142 ALR 21 (at 34): "*a relevant site is one which is of special or more than ordinary significance to native title holders. It is not enough that the site simply be of significance to native title holders.*" In this context to suggest that the nature or quality of interference applicable in section 237(a) can be transposed to section 237(b) is incorrect. When conducting an inquiry, the Tribunal is required to analyse very carefully any material on potential interference with a site of particular significance, because of the importance that area or site has to native title holders. Even very slight interference possibly in the context of paragraph (a), that could be characterised as "trivial", may be unacceptable. Much will depend on the nature of the site, the nature of the potential interference and the laws and traditions of the native title holders. The only sensible limitation that one could indicate, in the absence of evidence, is that the interference referred to in section 237(b) must involve actual physical intervention. The fact that a grantee may carry on activities in proximity to a site or area but does not physically go upon that area would not constitute interference even though those works may cause upset. It is only if the works

causing that upset have a direct bearing on community or social activities that they become the proper focus of the Tribunal's inquiry, and then pursuant to section 237(a).

[89] The native title party also contended that the areas or sites do not have to be in the proposed tenement area. This contention is soundly based, however, as the government party highlights, if an area or site of particular significance is not located on the proposed tenement, then if paragraph (b) is being relied upon by an objector, that objector should demonstrate how that area or site will be directly and physically affected by exploration activities. Those exploration activities could be either on or off site, but obviously if they are off site then the objector would need to demonstrate that those activities are in fact an integral part of the activities on site (eg. construction of roads, truck movements to and from the proposed tenement etc).

[90] The government party took issue with the suggestion of the native title party that all "*areas or sites have particular significance. Their identification and naming as separate to other areas of country is evidence of their significance.*" – *OSC* at para 54. Certainly, as Carr J highlighted in *Cheinmora v Striker Resources NL*, a site must be of special "*or more than ordinary significance*" to native title holders. His Honour, however, did point out that there "*is no reason why there should not be more than one such site in any relevant area.*" Nevertheless the statement of the native title party came after it had set out in paragraph 53 of its contentions, a series of sites which it was said were of particular significance. If the native title party was contending that all sites were of particular significance, then it would be a question of fact and it would be for this Tribunal to make its own assessment on the material presented. Certainly a bald assertion that all sites which are identified by name are of particular significance would not suffice.

[91] The native title party also suggested that, in addition to these areas or sites of suggested particular significance, it is likely that others also exist in the area of the proposed tenement (*OSC* at para 55). If an area or site of particular significance is claimed, then it must be capable of identification. A bald assertion in the abstract such as this without any supporting material is not sufficient. Clearly the best evidence about such areas or sites if they are of particular significance to native title holders is from those native title holders. It is clearly incongruous to claim that areas or sites are of particular significance to objectors and then imply that the objectors either won't or can't identify them, or possibly don't even know anything about them. If an area or site is significant it most be known and must be able to be located and the nature of its significance explained to the Tribunal: see *Western Australia/Winnie McHenry* WO98/125, 28 July 1999 Deputy President Franklyn.

[92] The native title party also suggested that the Tribunal apply the so-called precautionary principle to the protection of areas and sites, due to the importance of those areas or sites to the native title claim group and their culture. It was contended that the "*mere possibility of interference should be taken into account in making decisions that might allow such interference to occur." (OSC* at para 56a). The issue here is not the *degree* of interference, but the *risk* of interference. Clearly the precautionary principle as enunciated by the native title party involves a deviation of the "real risk" test enunciated by French J in *Smith* and, accordingly, I agree with the government party that it should be rejected. The Tribunal has now the advantage of two decisions of the Federal Court – *Smith* and *Little* which have adopted the "real risk" approach. With due respect to the native title party, if any other test is to be applied, then it must comport with the "real risk" standard.

[93] The native title party also suggested that there "*is no legislation that provides sufficient protection to sites and areas of significance to allow the NNTT to be satisfied that there is not a real or remote chance or possibility of interference with areas or sites of particular significance, and therefore a likelihood of such interference." (OSC* at para 62).

[94] The government party, on the other hand, contended that any areas or sites of particular significance would have the statutory protections afforded by the *Northern Territory Aboriginal Sacred Sites Act.* A "sacred site" is defined by reference to the definition of that term in section 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), namely:

> "*a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition."*

[95] The potential scope of the Act, therefore, would certainly encompass all areas or sites of particular significance. The government party correctly contends that a "sacred site" would be a site of particular significance. In addition, the definition includes sites "*otherwise of significance"*. A commonsense interpretation of this wording would lead one to the conclusion that it is wide enough to provide protection to sites of significance, even if not of particular significance as described by Carr J. It could well be that an area or site is of particular significance within the meaning of section 237(b), but which is not "sacred" within the meaning of that term in the definition. However, even if that were the case, a site of particular significance would be protected by the inclusion of sites that are "*otherwise of significance"*. There is no reason to give an unduly limited interpretation to the coverage of the Act, and in these circumstances it is drafted widely enough to cover all sites of particular significance.

[96] The government party lodged with the Tribunal an Affidavit of Hugh Joseph Bland which, inter alia, outlines the process by which sites are dealt with by the Aboriginal Areas Protection Authority ("AAPA"). This Affidavit confirms the contention of the government party in *GPSC* that a site gains the protection of the legislation whether it is registered or not (it may only be recorded). The government party highlighted key provisions of the Act: prohibiting entry onto a site (section 33), carrying on work on or using a site (section 34), desecrating a site (section 35) and contravening or failing to comply with a condition of an Authority or Minister's Certificate relating to work, which contravention causes damage to a site, or distress to a custodian of a site (section 37). In addition, section 64 of the *Aboriginal Land Rights (Northern Territory) Act 1976* makes it a criminal offence for a person to enter or to remain on a sacred site.

[97] The Tribunal's attention was also drawn to sections 24(k) and 24A of the *Mining Act.* Subsection 24(k) requires that the Minister, when granting an exploration licence (unless waived, varied or suspended) do so on the condition that the licensee will:

> "*not interfere with any historical site or object, or any Aboriginal sacred site or object, declared as such under any law in force in the Territory, otherwise than in accordance with that law."*

Section 24A provides that in addition to the statutory conditions imposed on every exploration licence pursuant to sections 24 and 166, such licences are, in addition, subject to such further conditions as the Minister determines and endorses on the licence. Subsection 24A(2) specifically provides: "*Conditions under subsection (1) may include a condition about ways of minimising the impact of the grant of the exploration licence on registered native title rights and interests in relation to the land concerned, including about any access to the land or the way in which any thing authorised by the grant might be done."*

The government party referred the Tribunal to the Second Schedule of Conditions (specifically conditions 1(b),3,4,12,18 and 20) approved by the Minister under section 24A of the *Mining Act* which, it was said, reduce the likelihood of interference with sites of particular significance and to the letter of grant of the proposed licence which will draw the grantee's attention to the various provisions thus militating against reliance of defences based on the absence of knowledge. The Tribunal was supplied with a copy of the standard form of letter which is sent (or proposed to be sent) to all persons or entities who have been granted an exploration licence. The letter specifically draws the attention of the grantee to the *Mining Act* and the *Northern Territory Aboriginal Sacred Sites Act.* Attached to the letter (inter alia) is a document setting out the First and Second Schedule

Conditions. The particular conditions the government party has referred the Tribunal to, are set out in the Second Schedule conditions are as follows:

> *"1. The Licensee shall carry out its activities in such a way as to minimise any impact to any extant native title rights and interests in the licence area, in particular by ameliorating:*
>
> *(a) any interference directly with the carrying on of community or social activities of registered native title claimants or holders; or*
>
> *(b) any interference with areas or sites of particular significance, in accordance with the traditions of registered native title claimants or holders.*
>
> *3. All exploration personnel and their contractors and agents shall be instructed on the legal necessity to protect sacred sties and other significant archaeological sites and structures which may exist within the licence area.*
>
> *4 Prior to carrying out any work in the licence area the Licensee must consult with the Aboriginal Areas Protection Authority and inspect the Register of Registered Sites. A Licensee wishing to carry out work may apply for an authority certificate.*
>
> *12. The Licensee shall take such steps as are practical to minimise disturbance to the soil, rocks, formations, creeks and watercourses.*
>
> *18. (a) The Licensee shall, prior to the commencement of exploration activities other than reconnaissance, convene a meeting on the licence area (or the nearest convenient locality) with registered native title claimants or holders to explain the exploration activities. The Licensee may also invite the relevant pastoral lessee(s) or landholders to this meeting.*
>
> *(b) Notice of the meeting shall be by letter and shall be posted to the registered native title claimants or holders and the representative body not less than 17 days before the meeting and shall nominate the date, time and place of the meeting.*
>
> *(c) The Licensee must have regard to representations made to it at the meeting regarding any aspect of exploration activities which raises concerns. These representations may deal with the avoidance access procedures of particular areas of land within the licence area.*
>
> *20. Should any native title claimant or holder lodge a written complaint with the Minister that exploration activities are being conducted in a manner that adversely affects native title rights and interests in the licence area, the Minister may do one or more of the following:*
>
> *(a) seek an explanation in writing about the matter from the Licensee;*
>
> *(b) request the Licensee attend a meeting with the Minister to discuss the matter;*
>
> *(c) request the Licensee attend a conference with the Minister and the complainant with a view to resolving the matter;*
>
> *and, having done one or more of the foregoing, may do one or more of the following:*
>
> *(d) direct the Licensee to carry out rectification work;*
>
> *(e) carry out rectification work at cost to the Licensee in accordance with section 166(3) of the Mining Act;*
>
> *(f) subject to the Mining Act, take any other action, including the cancellation of the licence, as the Minister considers appropriate.*

[98] The native title party contended that there is no blanket protection for sites of significance in the Northern Territory. It argued that the endorsements drawing the attention of the grantee party to relevant statutory provisions do not provide absolute protection nor prevent likely interference. Further it was contended that the penalties in the various pieces of legislation were not sufficient to provide an absolute deterrent to a grantee party who might be contemplating interfering with an area

or a site. Amongst other issues raised was that the sites register itself allegedly had deficiencies, with sites not expressing the full geographical extent or physical nature of a site. Locations, it was suggested, could be inaccurately described. Moreover it was pointed out that relying on site registration removes control over preventing interference with a site from traditional owners to the Site Authority (*OCR* at paras 32-37).

[99] The native title party sought to rely on a document, which it lodged with the Tribunal, entitled "*Analysis of legislation dealing with significant areas and sites"*. The native title party informed the Tribunal that this document is a legal opinion of Mr Angus Frith of Counsel and is in the nature of contentions (*ORTM* at para 5). This document is a comprehensive analysis of the relevant Commonwealth and Northern Territory legislation. For the purposes of this inquiry reference is made only to the specific discussion of the *Northern Territory Aboriginal Sacred Sites Act* in the context of section 237:

> "*46. Several of the provisions in the Sites Act mean that the regime it sets up is not sufficient, given the predictive task to be undertaken by the NNTT in assessing whether the s237 criteria are satisfied, to ensure that the act of granting an exploration licence, together with the rights able to be exercised under it, are not likely to interfere directly with areas or sites of significance [par237(b) NTA].*
>
> *47. The fact that an Authority Certificate can be issued if there is no substantive risk of damage to or interference with a sacred site [par 22(1) (b)] affords a lower level of protection for sacred sites than that contemplated by s237. Application of the criterion set out in paragraph 237(b) requires that the expedited procedure only applies if there is a real or not remote chance or possibility of interference with areas or sites of particular significance, regardless of whether that chance or possibility is less or more than 50% [Smith v South Coast Metals WO99/511]. Thus, an explorer could be granted an Authority Certificate, allowing the works or use of the land to proceed, even if there is a greater likelihood of interference occurring than is contemplated by the s237 criteria.*
>
> *48. In any event, the Sites Act provides for Ministerial override of the Authority's decision not to grant an Authority Certificate [s32]. The Minister has discretion to grant a Minister's Certificate. Ultimately the protection afforded by the Sites Act is discretionary only. It is not enough to prevent a real or not remote chance or possibility of interference with the areas or sites of particular significance.*
>
> ***49.** Further, the defence available in ss36(1) limits the deterrent effect of the offences set out in s33, s34, & s35.*
>
> ***50.** The Sites Act reflects the balancing exercise referred to in the long title. Given the competing interests to which it gives expression, reliance on it alone is not sufficient to prevent a real or not remote chance or possibility of interference with areas or sites of particular significance [Smith v South Coast Metals WO99/511]."*

[100] Reference needs to be made to the provisions in the *Northern Territory Aboriginal Sacred Sites Act* which deals with Authority Certificates. These are to be found in Part III Division 1 which is headed "Avoidance of Sacred Sites". Section 20 allows a person who proposes to carry out work on land to apply to the AAPA for an Authority Certificate. The AAPA is required to consult with the custodians of the sacred sites on or in the vicinity of the land which are likely to be affected by the proposed use or work. In addition the applicant can request a conference with the custodians, which may be held in the presence of the AAPA. Where the AAPA is satisfied that the work or use can

proceed without a substantive risk of damage or interference with a sacred site or an agreement has been reached with the custodians an Authority Certificate can issue. The Certificate describes the land on which work can be carried out or use made and conditions either determined by the AAPA or in accordance with the agreement reached with the custodians (section 22).

Nevertheless section 32 empowers the relevant Minister to override the Authority. Pursuant to section 30 a person who has applied for an Authority Certificate who is aggrieved by a decision (or a failure to make a decision) of the Authority can apply for a review of the decision by the Minister. The Act sets out a process by which this review can occur, but ultimately allows the Minister to either uphold the Authority's decision or issue a certificate allowing work to be carried out or use to be made of the land. Such a Ministerial certificate has the same effect as an Authority Certificate – section 32(2).

[101] It is open to the Tribunal in making its predictive assessment to have regard to the material that is sent by the government party to the grantee party which both minimises the chances of a grantee being able to rely on defences if prosecuted for interfering with sacred sites and also for requiring consultation with traditional custodians of sites and compulsory inspection of the Register of Sacred Sites. As mentioned there is evidence before the Tribunal that such material is sent to grantee's and detailed evidence of what is in the correspondence that is forwarded. The Tribunal has had regard to not totally dissimilar material in Western Australian inquiries – *Re Waljen People* (1995) 1 AILR 227, and consideration of such material in the context of making a predictive assessment was not disapproved of by the Federal Court in *Ward v Western Australia* (1996) 69 FCR 208.

The native title party quite rightly contended that drawing this type of material to a grantee party's attention does not provide absolute protection to sites of particular significance. While this is undoubtedly correct, the task of the Tribunal is to determine likelihood of interference, it is not required or mandated to uphold objections on the basis that there may be any risk (even totally remote) of interference.

A similar line of reasoning seems to pervade the contentions that: "*Registration of a site under the Sites Act does not ensure that there will be no interference with it" (OCR* at para 34). Once again that is undoubtedly correct, but it does not advance this inquiry. No such absolute guarantees can ever be given about the efficacy of protective legislation achieving the protection aimed for. The real issue is whether the statutory protective framework, and the manner of its administration, is such that there is or is not a real risk of interference.

[102] Applying both the presumption of regularity and having regard to the fact that grantee parties will be placed on notice, renders it unlikely, as a matter of general principle, that there is a likelihood of interference with areas or sites of particular significance. However, that is not to say that the Tribunal will not find that on the fact there is such a likelihood: see *Maureen Young/Western Australia/South Coast Metals Pty Ltd* WO00/402, 7 June 2001 Member Sosso.

[103] As to the discretion vested in the Minister to override the Authority and grant a Certificate to permit work to be carried out or use made, the government party referred the Tribunal to the following observations of Deputy President Sumner in *Jack Dann/Western Australia/GPA Distributors Pty Ltd* WO95/19 (No 2), 20 December 1995 (at p 14):

> "*I do not consider that the fact there is a Ministerial discretion, even if able to be exercised according to criteria which may not exist under the NTA, which permits interference with sites is of itself sufficient to say that there is likely to be in every case of this kind interference with sites. It would be necessary to look at the exercise of the Minister's discretion in this category of case and conclude that it had become a matter of common practice for the Minister's consent to be granted to enable exploration to proceed, such that the regulatory scheme was ineffective."*

The government party informed the Tribunal that in the 12 years that the *Northern Territory Aboriginal Sacred Sites Act* has been in operation, only one Ministerial Certificate has ever been issued. This occurred in 1991 and was in the Alice Springs Dam matter. In any case the decision of the Northern Territory Minister was in turn rendered ineffective because of a declaration under Commonwealth legislation. This evidence was not challenged or contradicted by the native title party.

In short, although the Northern Territory legislation allows for a Ministerial override there is no history of this power being exercised with any regularity. Certainly it could not be suggested that the whole scheme of sacred site protection is being eroded or rendered a sham by persistent Ministerial intervention. Indeed, in contradistinction, it would appear that the discretion vested in the AAPA to grant or refuse to grant Authority Certificates has remained immune to intervention from the Executive Government in the Northern Territory.

If there was to be a complaint about the erosion of the protection of sacred sites, then such a complaint could not be based on the override powers vested in the Minister. Such a complaint would have to be made about the manner in which the AAPA operates, or the legislation underpinning it.

[104] The native title party also contended that the penalties in the legislation were not sufficient to provide "*an absolute deterrent"* to interference with sacred sites. Most probably no penalty, however severe, could ever prevent breaches of the law. However, as indicated earlier, this Tribunal

is not required to determine the likelihood of interference based on such absolute standards. The submission that any risk of interference equates with likelihood of interference is misconceived, and it seems to hark back to the native title party's submission that any "*mere possibility of interference"* is sufficient to uphold an objection. Once again such a standard is not consistent with the real risk test enunciated by French J in *Smith.*

[105] One specific complaint by the native title party about the protection that would be afforded by the Northern Territory sacred sites legislation was that it had a number of deficiencies, including sites not showing the full geographical extent or physical nature of a site or area, or even inaccurately describing locations (see [98]). If this could be shown, then it would have serious ramifications, especially if either the government or grantee parties were contending that the Tribunal could sensibly rely on the register to protect sites.

[106] Following the on country hearing I convened a hearing in Darwin on 16 November 2001, and put to the government and native title parties a number of questions arising out of both the written contentions received to that time, as well as the evidence given at Kewulyi. Issue number 10 which was raised by the Tribunal was as follows:

> "*In the Objectors' Reply to the Contentions of the Government Party in the various objections, it is claimed that the Sites Register under the NT Sacred Sites legislation has deficiencies. It is claimed that the sites on it may not express the full geographical extent or physical nature of the site, and locations may be inaccurately described (at para 36 of DO 01/13). What evidence does the native title party (have) to justify its claim that there are inaccuracies on the Register, particularly in relation to any of the objections being dealt with. Also if the register does not deal with the full extent of a site, what particular sites is this a problem with in these matters, and is it intended that the objectors will be lodging better particulars?".*

[107] The native title party lodged with the Tribunal a document entitled "*Response to Tribunal Matters"*. In that document the native title party responds to the issues raised by the Tribunal at the 16 November 2001 hearing. It should be added that the issues raised concern more than one inquiry. Nevertheless in its response to this inquiry, the native title party adduced not one example of any of the inaccuracies suggested. Certainly issues have been raised about sites involving other inquiries, but nothing in respect to this matter. Consequently while I have contentions about the accuracy of the Register in the abstract, the native title party has produced no evidence that these alleged deficiencies have any impact on sites the subject of this inquiry.

The evidence

[108] The native title party relied, inter alia, upon paragraphs 3-5,8, 10 and 11 of the Witness Statement of Mr Bulabul which is set out at [13]. Mr Bulabul expanded on sites of particular

significance when giving evidence to the Tribunal at Kewulyi. The sites he spoke of (which the relevant AAPA site numbers provided when relevant) were as follows: (*OHC* at para 22)

1. Kewulyi (AAPA 5768-2), which is located outside of the proposed tenement. It is slightly west of the Kewulyi Community, which, as previously noted, is about 1.5 km from the boundary of the proposed tenement;
2. Rrewin (AAPA 5768-36); again this is a site located outside the proposed tenement, in this instance about 10 km from the south-eastern boundary and near to Blackwater Creek;
3. Namal Namal which, as previously explained, is east of Kewulyi;
4. A series of six hills to the east of the Kewulyi Community in or near to the proposed tenement, which are visible from the Community;
5. A hill to the south east of Kewulyi which is a Kirrimpu site, but outside of the proposed tenement;
6. A hill to the south of Kewulyi, outside of the proposed tenement, which is also a Kirrimpu site;
7. Bulumin, which is a Kirrimpu site on the Kewulyi Aboriginal Land Trust;
8. Bulubalurnarni, which is a Kirrimpu site at a waterhole on the dirt road from the Roper Highway to the Kewulyi Community, but which is outside of the area of the proposed tenement;
9. A hill (AA5768-3) where Garnji, the Jabiru landed and the Whirlwind went through. The hill is outside of the proposed tenement and is on the east side of the road south from Kewulyi Community to Hodgson Downs;
10. Waurangala (made by Jabiru) located on Hodgson Downs and outside of the proposed tenement. There is a spring there and was, allegedly, dug up by a mining company before Hodgson Downs came under Aboriginal ownership; and
11. Amakamawarra (AAPA 5768-39) which is a hill on the boundary of the proposed tenement and Hodgson Downs in the extreme south-east corner. There is also a spring located here.

[109] As Mr Justice Olney pointed out (see [18]), the principal character in Kewulyi mythology is Kirrimpu – or big old man hill kangaroo. His Honour's description of the area in and around the Kewulyi Community is such that it is clear that it is rich in dreaming sites, and that Kewulyi itself is,

in European terms, a sacred site, but also one that is of importance, and potential danger, to traditional owners.

[110] The native title party submitted that the purport of Mr Bulabul's on country evidence was as follows: (*OCHC* at para 23)

> *"a. In the law of the native title holding group the mining company won't go to Kirrimpu sites [page 16]. If there was any damage to any of those places, Sammy Bulabul with his Junggayi and Darlnyin would seek to prosecute them [pages 18-21].*
>
> *b. The hill where the Jabiru, Garnji, land is an important place, that Whirlwind came through there [page 28]. The mining company can't go there. If someone is caught digging in that are they (sic) will get punishment [pages 28 & 29].*
>
> *c. Amakamawarra is a hill where the Whirlwind went through. The mining company has to ask someone before they can go in there. They have to ask the Joey McDonald mob from Duck Creek [pages 33-34]"*

[111] Evidence was also given by Mr Peter Woods (Jarren Jawelunggu) who said that he was a junggayi for Mr Bulabul at Kewulyi (Mr Bulabul had also given evidence that Mr Woods and certain other named persons were junggayi for him – *Transcript* at pages 5-7). He gave evidence he was a worker for Mr Bulabul, meaning that he assisted in ceremonies. Mr Woods also assisted when damage is done to a ceremonial place by talking to the relevant people. In addition he said that if a ceremonial place is damaged Mr Bulabul had to pay a penalty, and that if he didn't: "*Well, you know, tribal law – bye bye, you know … Death, there is death penalty for that one."* (*Transcript* at page 44).

[112] The government party pointed out that Mr Bulabul said that he was the "boss man" for Kewulyi, which "*was not very big … it is only small"* (page 8). Moreover the Kewulyi ceremony site is located to the west of the proposed tenement (AAPA 5768-2), and, it was contended, was not contiguous with that area so as to be interfered with by the grant of the exploration licence.

[113] As previously indicated the government party's basic contention was that evidence of any site of particular significance located outside the area of the proposed tenement was "*irrelevant"*. This contention has already been rejected (see [89]), and in any event the government party pointed out that a different approach was adopted by Deputy President Sumner in *Smith v CRA Exploration Pty Ltd* (1996) 133 FLR 251. Amongst other matters raised by the government party, was a contention that if the Tribunal had regard to sites outside of the area of the proposed tenement (and the area of the native title determination application), it would be offending the so called "Brandy principle" (*Brandy v HREOC* (1995) 183 CLR 245) in that the Tribunal would be determining that the claimants were "holders" of native title to areas or sites in the absence of a determination of native title. I am not convinced by this line of reasoning. The Tribunal's task is to determine the likelihood of risk of interference to areas or sites of particular significance to the Objectors. There must be a

registered native title determination application before such a task is undertaken by the Tribunal. However, there is nothing in the Act which stipulates that the Tribunal is limited in this task to considering areas or sites that are geographically limited to the area of the proposed tenement or the area of the native title determination application. The task is to ascertain if the area or site is of particular significance to the native title holders and, if it is, then to determine the likelihood of interference to the area or site by the doing of the future act. There is, in my opinion, no infringement of the Brandy principle by the carrying out of this line of inquiry, and certainly there is no trespass by the Tribunal into the sole jurisdiction of the Federal Court on a finding of native title. Indeed if the contention of the government party was upheld, the inquiry the Tribunal would undertake would be artificial, limited and narrowly focused. The task given by the Federal Parliament to the Tribunal is to carry out expeditious but effective inquiries to determine whether the granting of proposed tenements are truly low impact future acts. The Federal Parliament has not entrusted this inquiry function to the Tribunal with the sort of artificial restraints suggested by the government party, which, if they did exist, would limit the worth and effectiveness of the inquiry process.

[114] The government party drew the Tribunal's attention to the on country evidence given by Mr Moses Silver. Under cross-examination by Mr Lavery, Mr Silver described a flat hill a couple of kilometres to the east of Kewulyi Community where the Kirrimpu came through. When asked if the site has a name, Mr Silver informed the Tribunal had it had no name and that "*No-one uses a name for it"* (*Transcript* at p 52). The government party contended that "*a hill has no name, therefore, is evidence that it is not of significance let alone particular significance. No ceremony is claimed for the hill, no dance, no song; nothing which elevates it into an out-of-the-ordinary significance in the traditions of the native title claim group. The hill is within the area of ELA 22339 but is not within s237(b) NTA because it is not of particular significance."*(*GPFC* at para 40). In addition, the government party referred to the *Statement of Contentions of Objectors* where at paragraph 54, it was said that the naming of areas or sites as separate to other areas of country is evidence of their significance. In reply the native title party contended that naming of an area or site is sufficient evidence of particular significance, but not necessary evidence of particular significance (*OCR* at para 19). It was also pointed out that Mr Bulabul testified to the importance of the hill with no name during the on country hearings (*Transcript* at pp 13-14).

There is no doubt that the sites where the Kirrimpu stopped on his Dreaming travels are of significance to the native title party. That much is clear not only from the material submitted to the Tribunal but also from the oral testimony received at Kewulyi Community, especially that given by Mr Bulabul (*Transcript* at pp 16-17).

It is also an uncontested fact that the hill is within the area of the proposed tenement, and that it is a site that has *not* been recorded by the Aboriginal Areas Protection Authority. Certainly I agree with the native title party that the fact that an area or site does not have a name, or a dance or a song is not determinative of whether it is of particular significance to native title holders. However, the absence of any identification or ceremonies and the fact that it is known to native title holders but has never been recorded by the AAPA are matters that the Tribunal can and should take into account in determining whether it is of particular significance.

I have formed the view that the material before the Tribunal does not establish that the so-called hill with no name is a site of particular significance as explained by Carr J in *Cheinmora v Striker Resources.*

[115] Evidence was also given about a whirlwind site – Amakamawarra – which has been recorded by the Aboriginal Areas Protection Authority (5768-39), and which is located on or near to the border of the extreme south-westerly portion of the proposed tenement. The evidence about this site was given by Mr Barney Illaga, and he was cross-examined by Mr Lavery at Kewulyi. Mr Lavery asked which "aspect" of the native title claim group he belonged to (Dangalaraba, Kewulyi or Barnu Barnu). Eventually the Tribunal was informed by Mr Frith that, on his instructions, Mr Illaga was a member of the native title claim group. The government party suggested that a real issue remains as to Mr Illaga's capacity to give credible evidence about the site, and that the weight to be ascribed to his evidence was at issue (*GPFC* at para 46).

[116] The native title party responded by arguing that the Objectors have the right to bring evidence before the Tribunal that is relevant, regardless of its source. Persons other than those in the native title claim group can give evidence, and with respect to sites or areas of significance it was contended that Aboriginal People who are not members of the claim group but who are knowledgeable about the areas or sites in question could give evidence. It was conceded, however, that such persons must have a right, under Aboriginal law and custom, to speak about the areas or sites. The following contentions were made by the native title party:

> "*14. Mr Illaga gave evidence that he had the right to speak under Aboriginal law about these sites or areas. The transcript shows that other members of the group of people giving evidence deferred to him in respect of speaking about those sites or areas [Mr Daylight Ngaiyunggu indicated that Mr Illaga wanted to speak about them, and deferred to him, at page 27. No one else present asserted that Mr Illaga should not speak].*
>
> *15. Objection was taken to the next question regarding which aspect of the native title claim group he belonged to: Dangalaraba (sic), Kewulyi or Barnubarnu.*
>
> *16. It is contended that any answer to this question is not relevant as not concerning a matter before the Tribunal.*

17. *Further, given Mr Illaga's evidence that he has a right to speak about the specific sites, he may be found to be a member of the group of native title holders. Certainly, the possibility of such a finding is open to the Federal Court.*

18. *Given that possibility, and the fact that the membership of the group of native title holders is not before the Tribunal, and the fact that the native title application is registered, the Tribunal can do nothing but accept the evidence of Mr Illaga."*

[117] It is certainly the case that any party before the Tribunal can present evidence that is relevant. A native title party is not limited to presenting evidence from members of a claim group on areas or sites of significance. However, it was entirely open and proper for the government party to seek clarification on the status of Mr Illaga to give evidence on the sites he spoke about. The native title party outlined, at length, the expansive notion of native title, and how it is not necessarily limited to traditional ownership but extends to traditionally based rights to the land. However, at the end of the day the Tribunal was provided with no further information on who exactly Mr Illaga is.
In *Little v Western Australia* [2001] FCA 1706, R D Nicholson J considered evidence provided to the Tribunal by Mr Bynder who was, it would appear, a member of the native title claim group. However, at issue was the capacity of Mr Bynder to speak on behalf of the claim group. His Honour noted (at 79): "*it is the case that Mr Bynder does not establish his qualifications to speak for the Badimia people so that his evidence has the weight of one Badimia person."*

As indicated, the Tribunal has not been enlightened on the status of Mr Illaga. There is some doubt if he is even a member of the claim group. This question is not determinative on the issue of his capacity to give evidence, but it is certainly an issue as to the weight that can be given to it. It is not correct to assert that simply because Mr Illaga gave evidence that the Tribunal can do nothing but accept it in any binding sense. The gravamen of the government party's objection was soundly based. The Tribunal needs to be satisfied that a witness has the status to speak authoritatively about the evidence provided. Issues of relevance here are whether Mr Illaga is or is not a member of the native title claim group. If he is a member of the claim group, what status does he hold to give evidence about the sites at issue. If he is not a member of the claim group, then why is he giving evidence about the significance of a site and not a member of the claim group, and if the site is of significance to other native title holders, is that significance mirrored within the Objectors' claim group.

The Tribunal acknowledges the evidence given by Mr Illaga, however the weight ascribed to it, is, necessarily, not as great as it otherwise would have been, having regard to the uncertain status of Mr Illaga within or vis-à-vis the claim group.

[118] Mr Illaga told the Tribunal that Amakamawarra is a place where the whirlwind went through. The native title party contended that it was reasonable to infer from the evidence that the track is a

Whirlwind Dreaming track. He also said that a mining company could not go "in there" and would have to seek the permission of the Joey McDonald mob of Duck Creek. Mr Illaga gave no evidence about any ceremonies, songs or dances for the site, and this, according to the government party highlights that nothing elevates it into being of more than ordinary significance in the tradition of the native title holders. In response the native title party suggested that the absence of songs etc for a site did not mean that those sites were of not particular significance.

In this instance the site has been recorded by the AAPA, but the Tribunal has been given little evidence as to the particular significance of the site to the native title holders. It is reasonable to infer that this site is of significance – the fact that it is a recorded site is important in this regard. However, except in a very general sense, there is little evidence before the Tribunal of the nature of the sacredness of this site which would enable a finding that it is of particular significance.

[119] Evidence was also given by Mr Illaga and Mr Bulabul about another site – Garinji. This is also a site within the area of the proposed tenement and also recorded by the AAPA (5768-3). Mr Bulabul told the Tribunal that this was a site where the Jabiru landed (*Transcript* at p 25). Mr Illaga said that the whirlwind went through there, that it was an important place and that a mining company could not go digging in that area as "*they are digging sacred site land"* (*Transcript* at p 29).

[120] The government party contended that there was scant evidence before the Tribunal for it to form the view that it was a site of particular significance. It was contended that there were no dances, ceremonies etc for the site and that it was not claimed to be sacred by any witness (*GPFC* at para 49). Clearly Mr Illaga did in fact indicate that the site was sacred. Although the weight to be given to Mr Illaga's testimony is necessarily not as great as other witnesses, his testimony is not at odds with the brief evidence given by Mr Bulabul. I found Mr Bulabul to be a witness of the utmost credibility, and in these circumstances I am of the view that the site called Garinji is in fact a sacred site, and a site of particular significance to the native title claim group. In reaching this conclusion I have also taken into account (and basically agree with) the contentions of the native title party in this regard (*ORFC* at para 23).

[121] The evidence before the Tribunal discloses that the area immediately to the west of the proposed tenement comprising and immediately surrounding the Kewulyi Community is of the utmost importance and significance to the native title claim group. It is a sacred area. The area of the proposed tenement, however, contains far fewer sites of significance to the native title claim group; although it is an area through which there are Dreaming Tracks. The Tribunal has formed the view that the only site of particular significance (within the meaning of that term in section 237(b)) within

the area of the proposed tenement, of which evidence was led, is recorded site 5768-3 known as "Garinji".

[122] The grantee party's representative (Mr Wilkie) gave testimony at the on country hearing. The following evidence is of some relevance (*Transcript* at pp55-56):

> "*Jeff Wilkie: I would just like to briefly say that although we are talking a great deal about Aboriginal sites, sacred sites, as the grantee party, or the explorer that is interested in exploring this country, I would like everyone to understand that Rio Tinto is very careful about site protection. I'm hearing today that there is a great deal of importance attached to many sites on this country and I want to assure the Native Title parties that Rio Tinto conducts its exploration program only after a site survey or site clearance or the work area clearance has been conducted with involvement of traditional owners, and by that I mean that Rio Tinto is very careful to make sure that sites are avoided at all times during exploration. That is all, thank you.*
>
> *Mr Sosso: So Mr Wilkie, are you saying, the grantee party's intention is that if the exploration licence were granted, that prior to any work being carried out you would do a site clearance in conjunction with the traditional owners?*
>
> *Jeff Wilkie: Yes, Member, that is my company's policy, that for the protection of sites and for the protection of Rio Tinto, we, as a matter of course, conduct site or work area clearances as a matter of policy, during all exploration, here or anywhere."*

[123] Mr Wilkie went on to inform the Tribunal that the grantee party's site clearance policy had been in place for at least seven years (*Transcript* at p 57) and, as indicated, applied to all exploration "*here or anywhere"*. The government party submitted that the grantee party's policy was neither contingent nor opportunistic, and the Tribunal agrees with this suggestion. Mr Wilkie also said that if the government party quarantined areas around the sites identified with the area of the proposed tenement whether that "*it would actually benefit us in that it would save us funds on work area clearances"* (*Transcript* at p 60).

It has already been indicated that the Tribunal can receive evidence of a grantee's intention (see [30]), and in making a predictive assessment I have taken into account the evidence given by Mr Wilkie.

[124] It was clear that there was some unease amongst members of the native title claim group concerning exploration based on an unfortunate incident that occurred some years earlier involving a Mr Ben Tapp. Prior to 13 December 1995 Mr Ben Tapp was one of four proprietors of Roper Valley station (Pastoral Lease 632). In his Report Olney J made these observations (at page 8):

> "*28. During the 1970s and 1980s a number of attempts were made to protect the Kewulyi site. The Aboriginal Sacred Sites Protection Authority eventually registered Kewulyi as a sacred site in 1981. The site as registered includes the homestead and its surrounds. In 1994 one of the then owners of the pastoral lease was prosecuted for a breach of s54 of the Aboriginal Sacred Sites Act (NT) for having caused unauthorised bulldozer work to be carried out. The lessee's defence was that the work was a normal and necessary element in the management of the station but the Magistrate found the charge proved and imposed a fine. The problem associated with the protection of the site was ultimately resolved by the subdivision of the pastoral lease and the acquisition of the claim area by the Kewulyi Aboriginal Corporation."*

[125] As indicated the Ben Tapp incident involved a prosecution launched after a complaint by the traditional custodians. The government party submitted an Affidavit by Hugh Bland, an Anthropology Research Officer with the Northern Territory Department of Justice. Mr Bland usefully summarised the events as follows (at para 7):

22 April 1983:	Kewulyi site registered under old AAPA legislation.
June-August 1992:	ceremony held at Kewulyi (T38) which resulted in rubbish allegedly being left close to the waterhole. Dr John Avery, Principal Anthropologist with AAPA, attended some phases, including the closing phase of the ceremony (T58), and registration of the expanded site was effected just prior to the culmination of the ceremony (T64).
12 August 1992:	registration of the expanded Kewulyi site under new AAPA legislation (T19).
4 December 1992:	pastoralist Ben Tapp instructed a contractor, Spencer Stephen Rose, to bury the rubbish at the ceremony site using a bulldozer. This caused damage to the hearth (97-99).
Early January 1993:	Sammy Bulabul "saw that damage", "He had dug the hole and go over ceremony cooking area and that's all." (T38)
4 January 1993:	Wes Miller of the Northern Land Council's Katherine office contacted Dr Avery in relation to alleged damage of the Kewulyi site (T64).
7 January 1993	Dr Avery travelled to Kewulyi to inspect the alleged damage (T65).
13 January 1993:	Sammy Bulabul (T40) and Dr Avery were both involved in the lodging of a complaint with the Katherine Police (T66).
September 1994:	Trial of Ben Tapp at Katherine Magistrates Court. He was convicted and fined $1000 in default 21 days imprisonment.

[126] The government party contended that Mr Bulabul when giving evidence did not express concern about exploration activities, but, rather, wanted such activities to be conducted in a culturally sensitive manner. In contradistinction the native title party argued that the Objectors were concerned about exploration or mining on the proposed licence area, and referred the Tribunal to the damage at Kewulyi by Mr Tapp (*ORFC* at paras 24 and 25).

[127] It was clear to the Tribunal that the concerns of the witnesses, especially Mr Bulabul, went beyond the mode of conducting exploration activities but rather, were directed in a generalised way with exploration activities per se, based, it would seem, on the Ben Tapp incident.

[128] As the government party contended, no evidence was led which established that any of the previous exploration activities on the area of the proposed tenement had damaged or interfered with any sites whether of particular or ordinary significance. In fact Mr Bulabul gave this testimony (*Transcript* at pp 17-18):

> *"Mr Frith … Are there any Kirrimpu places been damaged before?*
> *Sammy Bulabul: No*
> *Mr Frith: What about Kewulyi?*
> *Sammy Bulabul: Only Kewulyi damaged"*

[129] The issue to be determined by the Tribunal is the likelihood of interference with areas or sites of particular significance. The fact that a pastoralist almost a decade ago, and in clear and flagrant breach of the law, caused damage to a sacred site, does not of itself address the issue of the likelihood of the grantee party interfering with sites of significance. It does, however, go some way in understanding the origin and nature of the concerns expressed by the native title party about protecting areas and sites of importance.

[130] The government party contended that if the Tribunal determines that any area or site within the proposed licence area is of particular significance, and that it is likely to be interfered with, then a special condition would be attached to the Second Schedule Conditions to EL 22339 which would quarantine any area from exploration activity (*GPFC* at para 66).

[131] The native title party's response was that in these circumstances the Tribunal should determine that the expedited procedure does not apply (*ORFC* at para 30). The Tribunal agrees with this submission. Admirable though it may be in the abstract, it is not for the government party to point out that in the event that the likelihood of interference is determined, it can then, ex post facto, retrieve the situation by inserting a special condition of the type outlined. Once the likelihood of interference is established the Tribunal's task is clear: it is to determine that the act does not attract the expedited procedure.

Conclusion

[132] Of the eleven sites alleged to be of particular significance to the native title party (see [108]), the majority are located outside of the area of the proposed tenement. Only three sites are located within the area of the proposed tenement, and the Tribunal is satisfied that on the evidence led only one of those sites (Garnji) is of particular significance. It is clear that the Kewulyi area is sacred to the native title claim group, and is of particular significance within the meaning of that term in section 237(b).

[133] The grantee party's activities will not take place until a work program clearance heritage survey is conducted (*GrSC* at para 4). There is only one site of particular significance within the area of the proposed tenement, and the other sites of particular significance are located outside of this area. It has not been established how the off-tenement sites may be clearly and directly interfered with by the exploration activities on the proposed tenement.

The Tribunal has before it evidence that the grantee has a long established policy of work clearance programs which will be put into place in this instance. In addition, there is evidence about a range of legislative provisions in both the *Northern Territory Aboriginal Sacred Sites Act* and the *Mining Act* which are aimed at protecting sacred sites, and which have a wider connotation than simply areas or sites of particular significance. There is no evidence before the Tribunal that these legislative provisions are ineffective or that they are merely paper protections. Also, there is no evidence that the sites recorded by the AAPA are inaccurate or deficient as far as matters relevant to this inquiry are concerned. I have not found it necessary to deal at any length with the oral evidence of Mr Stead given on 3 December 2001 in this regard, as it does not go towards establishing any specific inaccuracies in the AAPA's sites register.

While the Tribunal has no reason to question the sincerity, honesty and accuracy of the evidence presented by Mr Bulabul (who, as previously indicated, was a witness of credit), nevertheless applying the presumption of regularity, it is difficult to conceive how any area or site of particular significance would be likely to be interfered with in any manner by the grantee party.

It should also be noted, that the Tribunal was impressed by the manner in which Mr Wilkie gave his evidence. There appeared to be a genuine and deeply felt attachment by Mr Wilkie, on behalf of the grantee party, to ensuring that any exploration activities are conducted in a culturally sensitive manner so that no further hurt be inflicted on the traditional owners following the unhappy precedent set by the Ben Tapp prosecution.

[134] I find that there are sites of particular significance on and near to the proposed tenement, but that on the evidence adduced, there is not a real risk that those sites will be interfered with by the granting of the proposed tenement.

Section 237(c) – Major disturbance to land or waters

General Legal Principles

[135] Section 237 (c) has two elements:

(a) whether the *future act* is likely to involve major disturbance to land or waters (the first limb); and

(b) whether the creation of *rights* the exercise of which is likely to involve major disturbance to land or waters (the second limb).

Objective nature

[136] The issue of whether an act or the exercise of rights is likely to involve major disturbance is a matter to be objectively determined by the Tribunal. It is not determined by a party claiming that there will be major disturbance and the Tribunal automatically accepting this opinion, no matter how genuinely held. As Wilcox J said in *Dann v Western Australia* (1997) 74 FCR 391 (at 395):

> *"It is for the Tribunal to determine whether a particular future act will involve a disturbance to land or waters and, if so, whether the disturbance answers the description of being a "major disturbance". Submissions from the parties may assist the Tribunal in reaching conclusions on these matters, but assertion is not enough; the Tribunal must decide."*

Major disturbance

[137] The meaning of "major disturbance" has been clarified by the Federal Court. It has been held that the Tribunal is to assess whether there is a likelihood of major disturbance from the viewpoint of the general community, but in so doing have regard to the perspective of the local community and to recognise and factor into the analysis, cultural differences, particularly as they pertain to the laws and customs of the claim group. This was explained by Wilcox J in *Dann v Western Australia* as follows (at 395):

> "*The word 'major' is an adjective of degree. In determining whether a given envisaged disturbance to land or waters amounts to a major disturbance, the Tribunal must make a value judgment….in doing this, the Tribunal must give the term 'major disturbance' its ordinary English meaning. It must consider the matter of degree from the viewpoint of the community generally. However, as the disturbance is necessarily a local phenomenon, its effect on local people is particularly important. The disturbance may have such*

consequences for people in the local area as to be properly called a major disturbance notwithstanding that it is of no consequence to people who live far away. And, or course, in evaluating the disturbance, the Tribunal must be aware of cultural differences. If the disturbance will have a significant impact on Aboriginals who live in or use the affected area, that might be sufficient to warrant a finding that it will constitute a 'major disturbance' even if it would be unimportant to non-Aboriginals."

Remedial action

[138] The government party has referred the Tribunal to the findings of Deputy President Franklyn in *Western Australia v Smith* (2000) 163 FLR 32 (at 47) where he found that regard could be had to remedial action proposed or to be undertaken by a grantee party in respect of any disturbance involved in the exercise of rights created by the future act. Deputy President Franklyn referred to the fact that section 237(c) speaks of major disturbance 'involved', not major disturbance 'caused'. Conversely, the native title party submitted (*ORCEE* at para 8) that the likelihood and effectiveness of rehabilitation is not relevant to the issue of whether the act is likely to involve major disturbance. The Tribunal accepts the conclusion reached by Deputy President Franklyn that evidence of remedial action can be taken into account. However if there is a likelihood of major disturbance the fact that remedial action is proposed is not necessarily a panacea. As Deputy President Franklyn also noted, much will depend on the nature, extent and duration of the major disturbance and the nature and timeliness of the remedial action proposed.

Physical nature of disturbance

[139] The government party submitted that the major disturbance contemplated by section 237(c) is physical disturbance to land and waters, not disturbance to cultural landscapes, mental states or relationships with country. In support of this proposition the government party cited the following comments of Deputy President Seaman in *Re Irruntyju-Papulankutja Community* (1995) 1 AILR 222 (at 224):

"Subsection (c) makes no mention of Aboriginal tradition. In my opinion it requires the native title parties to show that it is likely that the grantee party and those acting on its behalf, behaving lawfully in the exercise of rights given by the licence, will cause a physical disturbance to the land which constitutes a major disturbance by the standards of the wider community."

[140] There is no doubt that the focus of paragraph (c) is towards physical disturbance. A focus purely or significantly on non-physical disturbance would be inappropriate. However, since the Full Federal Court decision of *Dann v Western Australia* there has been a change of emphasis. Their Honours (and especially Wilcox and Tamberlin JJ) highlighted the appropriateness of factoring into an assessment of major disturbance "*the concerns of the Aboriginal community including matters*

such as community life, customs, traditions and cultural concerns of the native title holders" (per Tamberlin J at 401). As such while the *start* of any assessment of the likelihood of major disturbance is a consideration of the physical disturbance to land and waters, it is also relevant in such an assessment to then consider the impact of such physical activities on the customs, traditions etc of the native title claim group. In this context *one element* to be taken into account in assessing the likelihood of major disturbance is evidence of the impact of exploration on the cultural concerns of native title holders. It is, however, only one element in the Tribunal's contextual risk evaluation – another element being the nature of the physical disturbance, its extent, its duration etc. The nature of the intersection of these factors in any given inquiry will determine whether there is finding that there is a likelihood of major disturbance or not.

Contentions

Government Party Submissions

[141] The government party made the following submissions with respect to the *first limb* of section 237(c) – likelihood of the act involving major disturbance:

(a) section 24(e) of the *Mining Act* prohibits a grantee from carrying out any program involving substantial disturbance without the prior written approval of the Secretary of the Department of Mines and Energy;

(b) section 23(c) of the *Mining Act* only permits a grantee to extract or remove material for sampling and testing purposes – as distinct from productive extraction, removal or processing, and this is reinforced by s 24(b) which makes this a condition of grant;

(c) taking into account the regulatory scheme which prohibits "substantial disturbance" without prior approval and that productive mining has to proceed through an independent future act process, it was submitted that the Tribunal should conclude that the grant is unlikely to involve major disturbance.

[142] With respect to the *second limb* (creation of rights whose exercise is likely to involve major disturbance) the government party made the following submissions: (*GPSC* at paras 52-64)

(a) the grant of an exploration licence does not create a right to mine. Rights granted under such a licence only permit activities associated with exploration, which term excludes fossicking. A grantee party wishing to undertake a program of activities involving substantial disturbance to the surface of the licence area must seek approval pursuant to section 24(e) of the *Mining Act;*

(b) all exploration licences are granted conditional on the grantee causing as little disturbance as practical to the environment, and to comply with written directions to minimise disturbances or make good any damage already caused, including rehabilitation of the disturbed surface area of the land – s 166(a) *Mining Act;*

(c) reliance was again placed on the combined effect of section 23(c) and section 24(b) of the *Mining Act*, and that the grant of an exploration licence does not create a right to mine. The grant of a productive mineral lease is an independent, notifiable future act;

(d) any approval under s 24(e) of the *Mining Act* is subject to compliance with such remedial and activity-specific conditions as are considered appropriate for the protection of the environment. It was contended that these routinely include conditions for the complete rehabilitation of any area that will be subject to disturbance;

(e) reliance was placed on conditions 2,7,8,9,12,13,14,15,16,17,18,19 and 20 of the Second Schedule of Conditions (pursuant to section 24A of the *Mining Act)* and, in particular, conditions 19 and 20. Condition 20 has already been set out (at [97]), condition 19 is as follows:

> "*19(a) Pursuant to s.24(e) Mining Act (NT), the Licensee must obtain prior approval from the Minister for all exploration activities likely to cause substantial disturbance to the surface of the licence area such as drilling, costeaning, gridding, bulk sampling, camp establishment or road construction.*
>
> *(b) The Minister may determine that additional environmental and rehabilitation conditions be set in regard to such proposed activity, including the lodging of a rehabilitation security and the manner of auditing whether rehabilitation has been carried out in accordance with the conditions.*
>
> *(c) In particular the Minister may set conditions regarding the stripping and stockpiling of topsoil from areas to be excavated; the restoration of excavated areas; and the standard of rehabilitation and revegetation of disturbed areas."*

(f) the presumption of regularity, it was said, allows the Tribunal to presume that the Secretary will exercise the discretion vested responsibly, including the setting of appropriate remedial conditions;

(g) "substantial disturbance" though not defined, is interpreted administratively, to commence with any significant disturbance to the surface of the soil, and includes activities such as drilling, access-track clearance and costeaning/bulk sampling;

(h) it was also contended that section 24(e) permits the effective management of potential disturbances by prohibiting such disturbances without prior written approval, requiring the grantee party to inform the Secretary in advance of the nature and extent of the disturbance activity and to disallow the disturbance or effectively manage it and its rehabilitation so that no major disturbance is *involved;*

(j) the government party's conclusion was that the above regulatory scheme governing the exercise of rights, the additional statutory checkpoint which seeks to prevent and/or remedy disturbances and the statutory requirement that productive mining activities need to proceed through a separate and completely independent future act process, ensures that the Tribunal should conclude that the grant of the exploration licence does not create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

Native Title Party Submissions

[143] The native title party referred to the Witness Statement of Mr Bulabul, and in particular his concerns that drilling and bulldozing would make the country different (paragraph 15); the fact that he doesn't want *"a big mob of damage"* (paragraph 16) and that he wants a tailings dam to stop poison dripping into the river (paragraph 17).

[144] The Tribunal's attention was drawn to the fact that an exploration licence is granted for 6 years, with a renewal for up to a further 4 years – s 29A *Mining Act.* After 2 years, and at the end of each year after that, the area of the licence is reduced by at least half – s 26, unless the reduction is deferred – s 28. It was claimed the reductions in area, intensify the impact of exploration on the remaining country.

[145] Rights attaching to a grantee, it was contended, include:

(a) drilling and sampling;
(b) construction and use of tracks, roads, miners' camps, drill and sample sites;
(c) use of existing tracks and roads by exploration vehicles and machinery;
(d) setting up camps, and attendant problems of relatively large numbers of people, waste disposal, access roads and fire;

(e) taking and diverting water;
(f) seismic surveys;
(g) costeaning;
(h) rotary percussion;
(i) metallurgical testing, which, it was claimed amounts to mining without the right to remove the product or sell it.

[146] The potential major disturbance flowing from the exercise of these rights included: (*OSC* at paras 71-78)

(a) holes left on country which could caused injury unless plugged or filled;
(b) tracks built which could damage flora, reduce the isolation of specific habitats, allow invasion by weeds and other pests and potentially promote erosion;
(c) damage to beds and banks of watercourses;
(d) reduction of amount of water available to sustain fauna and flora;
(e) increased levels of noise, dust, mud, loose rock etc from exploration leading to problems of erosion, excessive dust driving away flora and/or fauna and risk of mud escaping into watercourses causing turbidity affecting fish habitats; and
(f) use of land otherwise used by the Objectors in accordance with their native title rights and interests

[147] With respect to the *first limb*, the native title party contended that section 24(e) only deals with disturbance of the surface area, and doesn't deal with disturbances to land or waters that does not involve disturbing the surface. It was also contended that section 23(c) does not set out the full extent of rights available to a grantee, and reference was made to exploration activities allowed pursuant to paragraphs 23(b) and (d). The native title party argued that section 23(c) allows a grantee to extract or remove ore etc on any basis other than production. Such extraction/removal may amount, it was said, to a major disturbance. It was also contended that an exploration licence permits high impact activities such as the construction of roads, drilling, sampling, costeaning and construction of camps. Finally it was said that the regulatory regime contemplates "substantial disturbance" with the prior approval of the Secretary, but that the government party did not address how that discretion is exercised. (*OCR* at paras 40-46)

[148] With respect to the *second limb* the native title party contended, firstly, that while the *Mining Act* contains provisions requiring payment of duties to the government party, none are payable to the

native title party. Negotiation of an agreement directly between native title holders and explorers ensures that native title parties are more likely to be able to protect their interests in preventing major disturbance.

[149] It was argued that rehabilitation doesn't mean that major disturbance hasn't occurred or that rehabilitation work itself may involve major disturbance. Moreover, the presumption of regularity does not extend, it was said, to enable the Tribunal to rely on anything that amounts to a fetter on the discretion of the Secretary.

[150] The native title party also made extensive submissions about suggested deficiencies with the Second Schedule Conditions. Two matters can be mentioned: first, that they are not enforceable by Objectors and, second, that several conditions are subject to the approval of the Minister, which means that the Minister may allow a grantee to perform the act prohibited by the condition.

Specifically, with respect to conditions 19 and 20: (*OCR* at paras 48-70)

(a) the native title party argued that the protection in 19 is subject to Ministerial discretion and only deals with disturbances to the surface of the soil; and

(b) the protection in condition 20 is dependant on Ministerial action, and native title holders have no right to direct a grantee party to stop exploration activities or otherwise prevent or rectify damage.

Grantee Party Submissions

[151] The grantee party informed the Tribunal that its intention is to conduct a regional diamond sampling program. The nature of the activities entailed in such a program was outlined at [65]. The range of exploration activities proposed by the grantee party include:

- Office geological studies and data reviews;
- Light vehicle or helicopter reconnaissance;
- Rock chip, gravel or loam sampling by hand or auger;
- Aerial surveys;
- Geophysical surveys; and
- RAB, RC and Diamond drilling.

Conclusion

[152] In addition to the material referred to above, the native title party submitted a document entitled "Exploration Activities". The author of that document was a Mr Foy. Mr Foy subsequently gave oral testimony before Member Stuckey-Clarke on 4 December 2001. It was agreed by each of the parties that the evidence provided by Mr Foy could be used in this inquiry. The transcript of that testimony was circulated to all parties and the government party made specific written submissions on Mr Foy's testimony – *Contentions in Relation to Expert Evidence.* In reaching my conclusion I have had regard to Mr Foy's testimony as well as the response of the government party.

[153] The government party attached to its *Final Contentions* a document that addressed item 14 of the generic issues dealt with at the Directions Hearing in Darwin on 16 November 2001. This involved the government supplying to the Tribunal and the other parties, information on the extent of previous mining/exploration activity on the area of the proposed tenement. The information disclosed by the government is that the area of Exploration Licence Application 22339 has previously had the following exploration licences granted over various portions thereof: Exploration Licences 3359, 3364, 4482, 4483, 6295, 6296 and 8275. In addition the government party circulated a map showing stream sediment sample sites with respect to Exploration Licences 3359, 3363, 6295 and 6296. The map indicates extensive exploration activity over the whole of the area of the proposed tenement, with the only portion left relatively untouched being in the extreme south-west. It would appear that the exploration activity occurred in two distinct phases: 1982-1983 and 1990-1991.

[154] The government party also attached to its *Final Contentions* an Affidavit by Mr Timothy Gosling, Assistant Director, Mining Engineering and Technical Support for the Mines Division of the Department of Business, Industry and Research Development (previously the Department of Mines and Energy). Mr Gosling deposed that since 25 April 1983 the Secretary had delegated his powers under section 24(e) of the *Mining Act* to approve a program of substantial disturbance on exploration licences, to the Director of Mines. Although the term "substantial disturbance" is not statutorily defined, he annexed to his Affidavit *Environmental Guideline No 1 – Substantial Disturbance in Exploration and Mining* which was issued in May 1995. In that document a series of actions are outlined, either individually or in combination, having the potential to cause substantial disturbance. Included in the list of activities is the following: "*exploration works: seismic lines, drill pads, drill holes including vacuum, auger and RAB, grids, tracks, costeans etc."* Persons are advised to obtain the approval of the Secretary prior to commencing a program of works. Mr

Gosling outlines the information the Department requires of persons and informs the Tribunal that such applications are assessed by suitably qualified officers within the Mines Division who take into consideration the scale and nature of the proposed activity, the geographic and geological aspects of the terrain, the type of equipment proposed to be used, the presence of water features and any known prior performance history of the applicant. The officer's assessment and recommendation is then forwarded to the Director of Mines.

Mr Gosling deposes that if approval is given it is invariably conditional, with rehabilitation requirements and timeframes being prominent as well as requirements to use existing access tracks (when possible) and that there is no approval to enter, carry out work on etc a sacred site. On notification of completion of a program of substantial disturbance a "desk top" audit is conducted, this may be supplemented by on-site audits if warranted.

In the five calendar years since 1 January 1997, the Director of Mines has approved 474 applications for substantial disturbance, with 70 having been approved from 1 January to 5 December 2001. During that same time period there have been 14 substantial disturbance approvals on 7 exploration licences for bulk sampling of diamond exploration.

[155] The Tribunal has before it extensive material on the regulatory regime for exploration activity in the Northern Territory. In applying a predictive assessment the Tribunal is not limited to considering only the plain words of legislation or subordinate legislation. It is open, and appropriate, for the Tribunal to consider any relevant material before it, including Ministerial or Departmental policies or procedures. Indeed if those procedures have been in place for some time (like the procedures in this matter), and have been routinely adopted by public servants in exercising discretions vested in them directly or as delegates, then such procedures are highly relevant. Earlier determinations of the Tribunal to the contrary were made following the decision of the Federal Court in *Dann v Western Australia* and are no longer applicable following the 1998 amendments to the Act – see eg *Paul Cox & Ors/Western Australia/Stirling Resources NL* WO97/97, 27 October 1997, Hon CJ Sumner at p 3.

[156] The material submitted highlights that the Northern Territory has in place a well advanced, integrated and pro-active legal regime for mining exploration, that pays significant regard to the native title rights and interests of traditional owners and which, to a very large degree, has succeeded in dovetailing native title considerations into the fabric of the decision making process.

[157] It is of importance that section 24(e) provides that *all* exploration licences are subject to the statutory condition that no program of substantial disturbance will be permitted without the approval of the Secretary. Even then section 24(k) places an absolute bar on any interference with any Aboriginal sacred site or object otherwise than in accordance with the *Northern Territory Aboriginal Sacred Sites Act.*

Obviously the fact that the Secretary *can allow* substantial disturbance to occur is of itself an issue. The government party has provided extensive material on how this process is managed, and emphasises the importance placed on rehabilitation. As previously noted, rehabilitation is a matter that can properly be taken into account, but it is not always an answer to the issue of major disturbance. Some disturbance may be so major that no matter what rehabilitation is proposed the land or waters may never recover or be made good again. This is a particular issue with exploration of the beds and banks of rivers and in areas of land of peculiar and potentially fragile geological composition.

However, there is no evidence in this instance that the exploration activities proposed will cause disturbance of such magnitude that appropriate rehabilitation activities will not remedy. Also there is no evidence of any particular environmental or geological considerations that are such that would render rehabilitation ineffective, or, at least, not fully effective.

[158] A further statutory limitation on explorers is to be found in section 166. This section sets out general conditions that apply to all exploration licences (etc). Paragraph (a) requires an explorer to:

> *"carry out his exploration … on the licence area … in such a way as to cause as little disturbance as practical to the environment, and comply with the reasonable written directions of the Secretary to take, within a specified time, such action as the Secretary considers appropriate to minimise that disturbance or make good any damage already caused by the holder, including the rehabilitation of the disturbed surface area of the land."*

[159] Regard also must be paid to the additional conditions required by section 24A, which have been referred to as the Second Schedule Conditions. Conditions 19 and 20 are focused directly on exploration activity, and the whole scheme of the Second Schedule conditions is designed to ensure that a licensee is to carry out exploration activities in a manner designed to minimise any impact on native title rights and interests (see, condition 1). The Second Schedule conditions deal with matters such as prohibiting the bringing of firearms or traps onto the proposed tenement and not killing or taking wildlife (condition 5), not using fire except for the preparing of food or heating water (condition 7), not constructing new vehicle tracks unless unavoidable (condition 8), clearing or disturbance of vegetation to be kept to a minimum (condition 9), removal of all rubbish and waste

(condition 14) taking all precautions to prevent contamination of underground or surface waters (condition 15) and choosing drillhole and excavation sites to minimise environmental impacts and sealing drillholes after completion of activities. This is not an exhaustive list of the matters set out in the Second Schedule, but it is illustrative of the regime in place designed to ensure that exploration activities are conducted in a responsible manner and one designed to avoid major environmental or cultural disturbances.

[160] One issue raised by the native title party about these conditions was that they are not enforceable by the Objectors, and that any concerns about compliance must be raised with the government party and dealt with in its discretion. The government party has draw to the Tribunal's attention section 166A of the *Mining Act* which provides as follows:

> ***"166A. Where acts may be done subject to conditions***
>
> *(1) Where under this Act an act may be done in relation to land in respect of which native title rights and interests exist or may exist subject to conditions relating to those rights and interests being complied with by the parties, the conditions have effect and may be enforced as if they were terms of a contract among the parties.*
>
> *(2) If a person lodges a native title objection to the doing of the act, any other person in the native title claim group concerned is taken to be a party for the purposes of subsection (1)."*

While this may not be a complete answer to the native title party's contention, section 166A does significantly empower members of a native title claim group to enforce conditions pertaining to native title rights and interests.

[161] The Tribunal notes that Mr Foy (who has been the Mining Officer with the Northern Land Council since 1995) testified on 4 December 2001 that the Second Schedule Conditions were "*extremely good*". His only criticism was that not enough inspection of exploration work and sites was being carried on by the government party – a point that was disputed (*Transcript of Evidence of Mark Foy* at pp 70-71).

[162] Finally with respect to the regulatory regime, regard also should be had to section 24(j) of the *Mining Act*, which requires an explorer to conduct exploration programs and other activities in such a way as not to interfere with, inter alia, the lawful activities or rights of any person, or to land adjacent to the licence area. Clearly this subsection could apply to minimise potential activities of an explorer which would or could impact negatively on native title holders carrying on community or social activities either at Kewulyi Community or on the proposed tenement.

[163] As previously mentioned, Mr Wilkie gave evidence during the on-country hearing at Kewulyi. The following testimony was given regarding the proposed activities of the grantee party should the exploration licence be granted (*Transcript* at pp 57-59):

> *"Mr Lavery: This particular tenement that we are talking about, ELA22339, what is the company's immediate intention if that tenement were granted?*
>
> *Jeff Wilkie: I haven't had a work program established at this stage, but a generic work program would include initial sampling, probably, stream sediment sampling across the tenement, after work area clearances have been completed.*
>
> *Mr Lavery: How would that sampling take place?*
>
> *Jeff Wilkie: It would probably take place by helicopter and perhaps by motor car. Sampling would involve what we call spring sediment or gravel sampling within the creeks.*
>
> *Mr Lavery: So you would take that sample from a creek bed or river bed?*
>
> *Jeff Wilkie: Yes, that's right, gravel – river gravels.*
>
> *Mr Lavery: How big, in that first instance, would that sample be?*
>
> *Jeff Wilkie: Initial gravel sampling is roughly 20-40 kilograms, two poly bags….*
>
> *Mr Lavery: Two poly bags from the creek bed?*
>
> *Jeff Wilkie: From each site.*
>
> *Mr Lavery: Is that – you are looking for diamonds presumably?*
>
> *Jeff Wilkie: The initial commodity in this area is diamonds.*
> …
>
> *Mr Frith: Jeff, the initial gravel sampling is only the program for the first year; it is not - it wouldn't be the program for years after that?*
> *Jeff Wilkie: No, it is an initial program for anything like this. There will be follow-up programs thereafter.*
>
> *Mr Frith: Those follow-up programs might be more intrusive?*
>
> *Jeff Wilkie: … or in a cultural sense they would be. They would involve some – potentially some disturbance up to drilling and perhaps bulk sampling.*
>
> *Mr Frith: Can you explain what bulk sampling is?*
>
> *Jeff Wilkie: Bulk sampling is taking at a particular site where you have indicators of diamond occurrence in a creek, we may take up to 20 tonnes of river gravel, process that through a – through a special plant to actually establish whether or not there is an occurrence in the immediate area. It is usually done by a front-end loader and tip truck."*

[164] As Mr Wilkie indicated, the initial extent of exploration activities will be limited to sediment or gravel sampling from creeks, limited to 20 to 40 kilograms per sample. Should follow up exploration occur, then up to 20 tonnes of river gravel may be taken.

[165] In the course of his testimony, Mr Foy outlined to the Tribunal the typical three stages of exploration activity in the Northern Territory – primary, secondary and tertiary. He explained that the primary stage was basically non-intrusive; in the nature of reconnaissance. The secondary stage involved extensive work on the ground, "*but not of an intrusive nature"*. The tertiary stage was "*getting to target examination and you're doing extensive intrusive work such as costeaning and drilling."* Mr Foy then told the Tribunal: "*a lot of the primary work is telling you where to look; the*

secondary work is looking, which you may or may not wish to carry any further; and the tertiary side is actually called the feasibility phase of operations where you are developing a prospect which you think may become a mine."

When asked how many of those phases would occur within 6 years, Mr Foy said: "*virtually any or all..I have had cases where companies have abandoned the exploration they wanted to carry out in the primary phase … its quite common that companies may abandon after the secondary phase. In fact, this is becoming more - more of how the large companies are operating these days where they're taking a very broad brush approach and going into large areas and going over those large areas, and then if they don't - if nothing comes up to interest them, they're out of them after two, maybe three years."* (*Transcript of the Evidence of Mark Foy* at p 11).

[166] When asked by Member Stuckey-Clarke whether the exploration activities he later outlined would involve any substantial disturbance, Mr Foy responded: "*The real only substantial disturbance which would occur in those would be preparation of access into an area."* (p 12) Mr Foy also gave evidence on stream sampling and heavy media separation (*"the way a diamond sampling is examined is that you take a very large sample, you break it down by gravity and/or heavy media separation").* He informed the Tribunal that the amount taken for this process was between 20-100 kg depending on the explorer, and then some explorers can take "*massive drainage samples"* of up to 50 tonnes. When asked how common it was for Northern Territory explorers to take up to 50 tonnes he said: "*not common. You would be looking at, say, on the average type of EL that you're looking at here, maybe a couple of samples, maybe none. It's not a – not a big technique, but it can – it can be quite useful, but it is – it is a technique used in diamond exploration."* Subsequently the Tribunal was informed that 50 tonnes would be about 25-30 cubic metres of material, which usually would be removed by a front-end loader and a 5-10 tonne truck. The truck would usually take 4 to 5 trips shipping it to a small plant for processing. (*Transcript* at pp 22-23).

[167] Under cross-examination by Mr Lavery, the following exchange occurred (p 62):

> *"Foy: When the stream is flowing there's always a certain sediment load within the stream, so that's referred to as the bed-load, and in comparison to what you take out, the bed-load in most – in the type of stream that you would sample would probably correct within one to two years.*
>
> *Lavery: One or two wet seasons?*
>
> *Foy: Yes*
>
> *Lavery: Yes. A stream would flow and then come back in a year's time or in two years time and you wouldn't ever know that a sample had been taken from that stream?*
>
> *Foy: Unless – the only way you would know that a sample had been taken, and there would be damage, is if you had, as a result of its removal, in the first wet season extensive bank erosion, which can occur."*

[168] Of interest is that the previous exploration activity on the area of the proposed tenement only involved stream sediment sampling, and from the documentation supplied to the Tribunal from the government party (based on Company Reports 1983-0058 - 59 and 1991-0213), it would appear that the extent of the sampling was limited to 40 kg samples with on site screening to collect a size fraction and then laboratory processing of the sample. It would appear that in the past no further follow-up exploration activity took place.

There is no evidence of any type before the Tribunal that the previous exploration activity in this area caused or involved major disturbance.

[169] As previously mentioned, Mr Bulabul expressed concern that it would be hard to live at Kewulyi if exploration activity went ahead. This was said in the context of Mr Bulabul's statement about the use of the proposed tenement by members of the native title claim group to hunt and gather foods and medicines. Subsequent oral testimony given at Kewulyi Community indicated that such activity is not intensive, widespread or broadly based. The proposed tenement area is very large. The traditional activities are relatively limited. It is not likely that exploration activities will involve any major disruption to the traditional lifestyle of the native title claim group as it now exists.

[170] Mr Bulabul also expressed concern about how the exploration activity would occur, mentioning drilling, bulldozing, leaving a mess, causing damage and possibly poisoning the watercourses. As previously pointed out, the regulatory regime in place in the Northern Territory renders it most unlikely that any of these concerns would ever come to pass. There is no evidence before the Tribunal based on past exploration activities, the proposed mode of operation of the grantee party, the substantial disturbance regime and the conditions imposed on the grant of an exploration licence, that the sort of concerns expressed are well founded, albeit sincerely held.

[171] The government party also drew to the attention of the Tribunal the following observation of French J in *Smith v Western Australia* (2001) 108 FCR 442 (at 451): "*The extent of interference and the proximity of causal connection to the future act proposed should not be considered in isolation. In assessing the risk of the direct interference generated by a future act the Tribunal is entitled to have regard to other factors which so affect the community or social activities that the impact of the proposed future act is insubstantial.*" In this context it should be borne in mind that if access to the proposed tenement is (in part) via the unsealed Hodgson River Road, then there is no evidence that the extra traffic caused by the exploration activity would create any significant disturbance to those members of the native title claim group living or staying at the nearby Kewulyi Community. This is a public road and is used by pastoral stations and Aboriginal communities, and there is evidence before

the Tribunal that it is used by a substantial number of vehicles (Affidavit of Kenneth William Grattan). Insofar as the traffic on this road will be increased by persons connected with exploration activity, the Tribunal agrees with the contention of the government party that the impact would be insignificant.

[172] A further issue is that the proposed tenement lies within two pastoral leases (PPL 1161 and 1162). As previously discussed ([41]-[45]), Northern Territory pastoral leases contain a reservation in favour of traditional owners. However the grant of a pastoral lease necessarily extinguishes exclusive rights to occupancy, use and enjoyment by native title holders. Further, as the High Court held in *Wik Peoples v Queensland* (1996) 187 CLR 1, where a pastoral lease does not confer exclusive possession on the leaseholder, there are co-existing rights between native title holders and leaseholders. However if *"inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees."* Per Toohey J at 133. This statement has been incorporated into the Act – see section 44H.

It is relevant to consider that the native title rights and interests of the claim group are subject to the exercise of any rights legally granted to the holders of the pastoral leases. The likelihood of major disturbance by the activities of the grantee party, has to be evaluated in light of the fact that the native title claim group is already subject, on a daily basis, to lawful activities of leaseholders which could have the potential to impact on their rights and interests. In this regard the Tribunal notes (for example) the submission of the government party that the pastoral lessees would be the greatest users (in terms of volume) of water on the proposed tenement.

The extent to which exploration activity would of itself potentially so affect the native title holders as to amount to a likelihood of major disturbance to land or waters, in the context of ongoing pastoral activity, is a matter which also has to be considered. Certainly as French J made clear in the above quote, evaluating the likelihood of direct interference, or, as in this case, major disturbance, is inherently contextual. The Tribunal has to take into account in evaluating the risk of major disturbance to land or waters other lawful activities on the area of the proposed tenement that of themselves are likely to cause disturbance to land or waters.

[173] Having considered the evidence before the Tribunal, I am unable to find that the grant of the proposed tenement would be likely to involve major disturbance to any land or waters concerned, or create rights whose exercise is likely to involve major disturbance to such land or waters. I have

formed the view that the exploration activity proposed is likely to be non-intrusive with the risk of environmental or cultural disturbance being very remote.

Determination

The determination of the Tribunal is that the grant of Exploration Licence 22339 to Ashton Exploration Australia Pty Limited is an act which attracts the expedited procedure under the *Native Title Act 1993.*

John Sosso
Member